No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY
and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and
EDUARDO E. MALAPIT, in his capacity as
MAYOR OF THE COUNTY OF KAUAI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF HAWAII

JURISDICTIONAL STATEMENT

LEON SILVERMAN, P.C.
One New York Plaza
New York, N.Y. 10004
(212) 820-8080
Counsel for Appellants
Pacific Standard Life
Insurance Company
and Graham Beach
Partners

FRED P. BOSSELMAN, P.C.
Ross & Hardies
WALTON D. Y. HONG
Masuoka & Hong
EDWARD A. JAFFE
Cades Schutte Fleming & Wright
SHELDON RAAB, P.C.
Fried, Frank, Harris, Shriver &
Jacobson
FRANCIS A. WONG
Rice, Lee & Wong

Of Counsel

March 5, 1983

QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of Hawaii erroneously interpreted this Court's decisions in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), as permitting the people of a county, by use of a general referendum power conferred by a county charter, to void the existing zoning on a single parcel of property, to revoke previously issued building permits and to halt construction already under way, without resort to the eminent domain power.

2. Whether the provisions of Article V of the Charter of the County of Kauai, Hawaii, which, as construed and applied by the Supreme Court of the State of Hawaii, permit through the referendum process the *ad hoc*, selective and particularized rezoning of a single parcel of property so as to halt construction in progress, without resort to the eminent domain power, violate the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment as incorporated in the Fourteenth Amendment.

3. Whether the referendum in this case (adopted pursuant to the provisions of Article V), which purportedly repealed an existing zoning ordinance, violated the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment as incorporated in the Fourteenth Amendment, by voiding the existing zoning on a single parcel of property, revoking previously issued building permits, and halting construction already under way, without resort to the eminent domain power.

4. Whether, in the circumstances here presented, the voiding of the existing zoning on a single parcel of property, the revocation of previously issued building permits, and the halting of construction already under way, without resort to the eminent domain power, violate the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment as incorporated in the Fourteenth Amendment.

LIST OF INTERESTED PARTIES

The following were parties to this proceeding in the Supreme Court of Hawaii: County of Kauai, Hawaii, petitioner-appellee; Pacific Standard Life Insurance Company and Graham Beach Partners,[1] respondents-appellees; Committee to Save Nukolii, respondent-appellant; Eduardo E. Malapit, in his capacity as Mayor of the County of Kauai, third-party defendant-appellee. The County of Kauai and Mayor Malapit supported the position of appellants throughout the proceedings below; only the position of the Committee to Save Nukolii was adverse to appellants herein.

Since this proceeding draws into question the constitutionality of statutes of the State of Hawaii, and neither the State of Hawaii nor any agency, officer or employee of the State of Hawaii is a party, 28 U.S.C. § 2403(b) may be applicable to this proceeding. Accordingly, notice thereof has been given to the Attorney General of the State of Hawaii, and he has been served with the Notice of Appeal herein and this Jurisdictional Statement.

---

[1] Appellant Pacific Standard Life Insurance Company, an Arizona corporation with its principal place of business in California, is a wholly owned subsidiary of Pacific Standard Life Company, a Delaware corporation with its principal place of business in California. All subsidiaries of Pacific Standard Life Insurance Company and Pacific Standard Life Company are wholly owned and there are no corporate affiliates of either corporation. Appellant Graham Beach Partners is a Hawaii limited partnership with its principal place of business in Hawaii and whose general partner is Hasegawa Komuten (USA), Inc., a Hawaii corporation with its principal place of business in Hawaii. Hasegawa Komuten (USA), Inc., is a wholly owned subsidiary of Hasegawa Komuten Co., Ltd., a Japanese corporation with its principal place of business in Japan. The only non-wholly owned subsidiary of Hasegawa Komuten (USA), Inc., is Haseko California, Inc., a California corporation, and, except as set forth, there are no corporate affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

This is an appeal from the judgment of the Supreme Court of the State of Hawaii entered on December 27, 1982, which reversed a decision of the Circuit Court of the Fifth Circuit, State of Hawaii (the "State Circuit Court").

The opinion of the Supreme Court of Hawaii, which appears in the Appendix hereto ("App.") (at A-1, *infra*), is reported at __ Haw. __, 653 P.2d 766 (Hawaii 1982).

The *per curiam* order of the Supreme Court of Hawaii on the motions for reconsideration, dated December 6, 1982, is presently unreported and is reprinted in the Appendix hereto (at A-72, *infra*).

The decision of the State Circuit Court, dated February 9, 1981, is unreported and is reprinted in the Appendix hereto (at A-27, *infra*).

JURISDICTION

This proceeding involves an action commenced in the State Circuit Court for a declaratory judgment as to the effect of a referendum (the "1980 Referendum") adopted by the voters of the County of Kauai, Hawaii, in the November 1980 general election. The Referendum, which was adopted pursuant to Article V of the Charter (the "Charter") of the County of Kauai, Hawaii, purported to void the existing zoning of appellants' property. Prior to the adoption of the Referendum, the required building permits and other necessary governmental approvals had been obtained and construction was under way.

The judgment of the Supreme Court of Hawaii being appealed from was entered on December 27, 1982 (App. at A-70). Such judgment was based on the decision of the Supreme Court of Hawaii entered on October 14, 1982, which reversed the granting of summary judgment in favor of appellants, and remanded to the State Circuit Court with instructions to order the

granting of summary judgment against appellants, revocation of their validly obtained building permits, and an injunction against further construction on their property (which construction by then had been on-going for over two years) (App. at A-25). Motions for reconsideration were filed within the time allowed by the Supreme Court of Hawaii (*see* App. at A-69) and were denied by that Court on December 6, 1982 (App. at A-72).

A notice of appeal to this Court was duly filed in the Supreme Court of Hawaii on February 28, 1983 (App. at A-74). Pursuant to Rules 11 and 12 of the Rules of this Court (1980), this appeal is being docketed within 90 days from entry of the judgment of the Supreme Court of Hawaii.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2) on the grounds that the judgment of the Hawaii Supreme Court was a final decision[2] which expressly determined that the 1980 Referendum and Article V of the Charter,[3] as construed and as applied to appellants' property, did not effect a "taking" in violation of the constitutional principles under the Fourteenth Amendment laid down in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668 (1976), and that the use of the referendum to effect a rezoning in this case met due process requirements as determined in *Eastlake, supra.*

---

[2] Although the Hawaii Supreme Court remanded to the lower state court as to the nature of the remedy, the judgment of the Hawaii Supreme Court was a final decision on the federal constitutional questions presented on this appeal which would not be affected by the outcome of any future lower state court proceedings and hence constitutes a final judgment for purposes of 28 U.S.C. § 1257(2). *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

[3] A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. § 1257(2). *See, e.g., Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 n.3 (1975); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100 (1928). Likewise, a local legislative enactment by referendum or initiative which a state gives the force of law—as the 1980 Referendum—is deemed a state statute for purposes of 28 U.S.C. § 1257(2). *See, e.g., Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California*, 454 U.S. 290 (1981); *Hunter v. Erickson*, 393 U.S. 385 (1969). *See also, e.g.*, discussion in *Lathrop v. Donohue*, 367 U.S. 820, 824-25 (1961).

In the event this Court determines that appeal jurisdiction as to any of the federal questions raised herein is inappropriate, appellants respectfully request that those questions be treated as if contained in a petition for certiorari pursuant to 28 U.S.C. § 2103.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

U.S. Constitution amend. V

U.S. Constitution amend. XIV, § 1

Charter of the County of Kauai, Hawaii,

art. V, §§ 5.03(B)-(C), 5.07 (A)-(C), 5.09, 5.11

art. XXII, § 22.07 (E)

County of Kauai, Hawaii, Referendum Petition (certified on January 30, 1980 and enacted on November 25, 1980 upon certification of the results of the General Election of November 4, 1980)

County of Kauai, Kawaii, Or. No. 334

County of Kauai, Hawaii, Or. No. PM-26-79

County of Kauai, Hawaii, Resolution No. 151

Pursuant to Rule 15.1(f) of the Rules of this Court, the text of the foregoing constitutional provisions, statutes and ordinances is set forth in the Appendix hereto (at A-80 *et seq.*, *infra*).

STATEMENT OF THE CASE

A. Summary

The property which is the subject of this appeal is situated at Hanamaulu, Island and County of Kauai, Hawaii, is commonly known as the "Nukolii site" and is comprised of 60.425 acres.

Prior to the adoption of the 1980 Referendum, the Nukolii site was zoned for resort development (App. at A-4-5). The development in question consists of 150 condominium units and a 350-room hotel.[4] As of the date of the Hawaii Supreme Court's decision, all 150 condominium units had been completed, 136 such units had been sold, 131 units were actually occupied, and the hotel was approximately thirty percent complete.

The most salient facts detailed below, in summary fashion, are as follows:

1. The Charter contains both initiative and referendum provisions. All ordinances (with exceptions not here relevant), including but by no means limited to zoning ordinances, are subject to repeal by use of the referendum power. A referendum is "certified" to be placed on the ballot if a petition is signed by twenty percent of the number of eligible registered voters at the time of the last general election (here, in 1978).

2. The Referendum in question occurred in November 1980. The voters of the County voted to repeal the resort zoning on the Nukolii site but the Referendum itself contained no explicit reference to any retroactive effect of the vote. Until the recent decision of the Hawaii Supreme Court, all of the government officials concerned—and the Hawaii courts—refused to give retroactive effect to the vote.

3. Prior to the Referendum vote to rezone the Nukolii development, Section 5.11 of the Charter expressly provided:

> A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum.

4. Prior to the Referendum vote, approximately $4.3 million in costs had been incurred with respect to the development at

---

[4] The Developers' initial plan for the Nukolii site included three hotels of five hundred rooms each on all 60 acres. To meet the concerns of the County and the citizens of Kauai as to the magnitude of the proposed development, the Developers agreed, prior to the 1980 Referendum, to reduce the scope of the project to 25 acres and to limit the development to 150 condominium units and a 350-room hotel (App. at A-5).

Nukolii. All necessary permits had been obtained—after a series of public hearings and close scrutiny by numerous governmental agencies—and construction was in progress.

5. As a condition to obtaining the necessary County approvals, appellants had been required to construct various public improvements for the benefit of the County. Pursuant to these requirements: (a) they improved and upgraded at their expense ($1.985 million) the Wailua-Kapaa water system (which serves the major population center on Kauai); (b) they dedicated—in perpetuity—a right of way to allow the public access to and then along the beach at Nukolii; (c) they built a paved access road more than one-third mile long from the Kuhio Highway to the beach and a parking lot with spaces for use by the public; (d) they installed water and sewer connections for public shower and restroom facilities at the beach; and (e) they paid a fee of $500,000 in lieu of required park land dedication or assessment. Although the Hawaii Supreme Court ordered the refund of the "in lieu" fee, the County and the public retain the benefit of the foregoing facilities—built as prerequisites to the contemplated land use at Nukolii—while the appellants' own investment and development has been halted by the Hawaii Supreme Court's decision.

6. Almost $50 million had been invested in the development by the time the Hawaii Supreme Court determined in October 1982 that construction should be stopped and that the building permits should be revoked. The 136 condominium purchasers had invested approximately $35 million in the project and, prior to the halt in construction, approximately $13.8 million had been spent by appellants on building the hotel (which had been estimated to cost approximately $48.5 million upon completion).

B. Statement of Facts

Appellant Graham Beach Partners was formed for the purpose of developing the Nukolii site; and appellant Pacific Standard Life Insurance Company ("PSLI") is one of the limited partners in Graham Beach Partners. (Hereafter, appellants PSLI and Graham Beach Partners will be collectively referred to as the "Developers".) Appellee, the Committee to Save Nukolii (the

"Committee"), is an unincorporated Hawaii association organized for the purpose of opposing development on the Nukolii site. Eduardo E. Malapit was, at all times relevant to this appeal, the Mayor of the County of Kauai and, as such, the chief executive officer of the County.

At all times during the course of this action in the Hawaii courts, both the County of Kauai and Mayor Malapit supported the position of the Developers that the 1980 Referendum could not affect the building permits obtained prior to the Referendum nor halt the construction which had likewise already been commenced.

Prior to the commencement of construction on the Nukolii site, the Developers had obtained the required State and local consents, approvals and permits from numerous governmental agencies.[5] These governmental consents *permitting* construction were obtained *prior* to the adoption of the 1980 Referendum purporting to void the zoning on the Nukolii site.

PSLI purchased the Nukolii site in 1974 and, in 1976, the State of Hawaii changed the "agriculture" designation of most of the site to "urban". On November 25, 1977, in a comprehensive revision affecting numerous properties, the Kauai County Gen-

---

[5] Land-use policy and planning is comprehensively codified in Hawaii on the State and local levels. The State of Hawaii exercises control over land-use through a state land use commission which designates land-use boundaries within the State, Hawaii Rev. Stat. ch. 205 (1976 & Supp. 1981). Counties are required to adopt plans which control land use, consistent with state land-use policies, Hawaii Rev. Stat. § 226-61 (Supp. 1981). Specific zoning must be accomplished within the framework of such plans, Hawaii Rev. Stat. § 46-4 (Supp. 1981). For property located within coastal areas (such as the Nukolii site), county land-use regulation must also comply with the Coastal Zone Management Act of Hawaii, Hawaii Rev. Stat. ch. 205A (Supp. 1981). That Act requires a county special management area ("SMA") use permit, which assures compliance with State coastal zone development standards, to be approved before any other necessary permits can be issued, including county building permits authorizing actual construction. On the local level, the Charter additionally requires that the County Council adopt a general plan by ordinance to govern land use and development, Charter, §§ 15.06, 15.08 (App. at A-95). Specific zoning ordinances must be consistent with the County's general plan, Charter, § 15.10 (App. at A-96).

eral Plan was amended. One of the amendments designated the Nukolii site as "resort", Ord. No. 334 (App. at A-88). Thereafter, on February 1, 1979, the Kauai County Council adopted an ordinance, in conformance with the State's designation and the County General Plan, to rezone 25 acres at the Nukolii site from "Agriculture and Open Districts" to "Resort District RR-20", which was signed into law by Mayor Malapit as Ordinance No. PM-26-79 (the "Zoning Ordinance") (App. at A-83). Each of these planning decisions was consistent with the action taken at the next highest level, as required under Hawaii's comprehensive scheme of land-use regulation.

Subsequent to these zoning actions, on April 9, 1980, after public hearings in which the Committee participated actively and vigorously, the Kauai County Planning Commission approved the Developers' SMA use permit and a Class IV zoning permit (required for a project with more than 25 dwelling units), authorizing the development of the proposed 350-room hotel and 150 multi-family units on the Nukolii site (these permits having been applied for by the Developers on December 27, 1979) (App. at A-37).[6]

In its decision, the Hawaii Supreme Court acknowledged that SMA use permit approval, under Hawaii law, constituted "final discretionary action" on the part of local government and "official assurance" that a landowner's proposed development could proceed without risk, the issuance of building permits thereafter being "purely ministerial" (App. at A-12-15). Hence, almost a full seven months prior to the 1980 Referendum, the Devel-

---

[6] In the permit application process and the public hearing which followed, the Developers were required to show that the project satisfied SMA requirements regarding coastal dependent recreational activities, historic or archeological resources, wildlife habitats, drainage, and visual aesthetics. SMA use permit approval was also subject to further terms and conditions to be satisfied by the Developers prior to obtaining the actual building permits. Some of the conditions to the SMA use permit required the Developers to agree to provide a minimum number of paved public parking stalls at one end of the public beach right-of-way, a paved beach public access road, a six-foot pedestrian easement paralleling the shoreline inside the boundary of the property, and public restrooms with showers (App. at A-55-59).

opers had obtained the *final* official assurance, under Hawaii law as construed by the Hawaii courts, that it could proceed in the contemplated use of their land, subject only to their complying with the SMA use permit conditions and other legal requirements—which they did.

Accordingly, a building permit for actual construction of the condominium portion of the development was issued by the Kauai Department of Public Works on August 5, 1980; this permit had been applied for by the Developers on April 29, 1980. A building permit for the 350-room hotel was issued on November 3, 1980; this permit had been applied for on August 4, 1980 (*see* App. at A-6).

On January 15, 1980, the appellee Committee submitted to the Clerk of the County of Kauai a referendum petition seeking to have the Zoning Ordinance either repealed by the County Council or referred to the electorate.[7] On January 30, 1980, the County Clerk certified the petition as having the requisite number of signatures, *i.e.*, at least 20 percent of the number of eligible voters registered at the time of the last general election, which was held in 1978 (*see* App. at A-5). This certification, of course, did not effect a rezoning; it merely triggered a require-

---

[7] Article V of the Charter, establishing initiative and referendum procedures, was adopted in 1976 (App. at A-80-82). With certain exceptions not relevant here, all ordinances enacted after January 2, 1977, are subject to the referendum power. Charter, §§ 5.02,-.10 (*see* App. at A-8). Once a referendum petition is certified, which requires signature of no fewer than twenty percent of the number of eligible registered voters in the last general election, the Kauai County Council must reconsider the ordinance within thirty days and either repeal or sustain the measure. *Id.* §§ 5.03(C),-.07(A). If the Council fails to repeal such ordinance, it must refer the ordinance to the voters of the county no later than the next general election. *Id.* § 5.07(B), (C). A majority vote cast on the referendum issue is required to repeal the subject ordinance, and repeal is effective only upon certification of the election results. *Id.* § 5.09. As discussed, a referendum cannot affect any "vested rights" or "any action taken or expenditure made up to the date of the referendum." *Id.* § 5.11. Also discussed *infra* and as significant, prior to the November 1980 general election, there was *no* provision in the Charter that mere certification of a petition could affect the operation of any county ordinance, including a zoning ordinance, prior to actual adoption of the referendum.

ment of the referendum provisions that the County Council consider repeal of the Zoning Ordinance and, if the Council did not repeal the ordinance, that the issue of possible repeal be put to the voters (App. at A-81). The Developers could (and did) proceed with their development after such certification and continued to obtain valid and proper government approvals and permits after certification. There is no doubt that they could do so under the law of Hawaii; and, as hereinafter appears, the government officials concerned and the Hawaii courts consistently so ruled.

Almost immediately after certification, on February 5, 1980, the County Council voted to re-affirm the zoning of the Developers' property and sustained the Zoning Ordinance, Resolution No. 151 (App. at A-5-6, -93). Pursuant to the provisions of the Charter, the County Council then referred the Zoning Ordinance to the electorate at the next general election scheduled for November 4, 1980. *Id.*; *see* Charter, § 5.07(B).

Meanwhile, on March 10, 1980, prior to Planning Commission action on the SMA use permit, the office of the County Attorney for the County of Kauai issued a legal opinion to the effect that the certification of the Referendum petition did not suspend the operation of the Zoning Ordinance and that the County should continue to process the Developers' permit applications pursuant to such Ordinance (App. at A-60).

The State Circuit Court reached the same conclusion. On May 9, 1980, the Committee appealed the decision of the Planning Commission approving the Developers' SMA use permit to the State Circuit Court, *In the Matter of the Application of Pacific Standard Life Insurance Company, et al.*, Civil No. 2260 (5th Cir.). On July 7, 1980, the State Circuit Court affirmed the decision of the Planning Commission, holding that certification of the Referendum petition did not suspend the effect and operation of the Zoning Ordinance (App. at A-32). The Committee appealed this decision to the Supreme Court of the State of Hawaii (Dkt. No. 7998), but the appeal was withdrawn on January 8, 1982 (*see* App. at A-6, -19).

On August 27, 1980, the Committee filed another complaint in the State Circuit Court, seeking to enjoin construction of the

condominiums on the ground that the building permit therefor was not validly issued, *Committee to Save Nukolii, et al. v. Nishimoto, et al.*, Civil No. 2321 (5th Cir.). The State Circuit Court denied the Committee's request for a temporary restraining order and preliminary injunction on September 5, 1980 (App. at A-34).

In both of the foregoing actions, the County of Kauai supported the position of the Developers that the permits in question were validly issued. The Hawaii Supreme Court has not disturbed the findings of either decision.

On November 4, 1980, the voters of the County of Kauai adopted the 1980 Referendum by a vote of 10,794 to 5,618 (App. at A-6). This vote purported to repeal the Zoning Ordinance which had been enacted almost two years earlier.

By the time the 1980 Referendum was adopted, construction had already begun on the Nukolii site on the basis of the previously issued building permits. The Charter was crystal clear that the adoption of the Referendum could *not* reach back in time to render illegal that which had previously been legal. Section 5.11 of the Charter provided that the referendum process would not affect "any vested rights" or "any action taken or expenditure made up to the date of the referendum."[8] Thus, the Developers proceeded in reliance upon and in conformity with this provision, as well as the foregoing approvals and permits and the above-described decisions of the County Council, the County

---

[8] *See also* Hawaii Rev. Stat. §§ 1-3, 1-10; Kauai Rev. Code Or. § 1-4.3, all of which also preclude retroactive effect of repeals or enactments of statutes (App. at A-95-96). At the time of the 1980 Referendum, the voters also approved an amendment to Article V of the Charter to provide that certification of a referendum petition to repeal an ordinance would suspend operation of the ordinance in question until the referendum is voted on and the results certified. (Such amendment has been codified by the Kauai County Clerk as § 22.07(E) of the Charter.) (App. at A-82). Theretofore, no such provision existed, as confirmed by the opinion of the County Attorney and the decision of the State Circuit Court (App. at A-32-33 and A-60). The adoption of such amendment did not affect the Developers since the certification of the 1980 Referendum occurred almost a year before the amendment was adopted.

Attorney and the State Circuit Court—none of which was overturned by the Hawaii Supreme Court.

As of November 3, 1980, the day prior to the general election, foundations for eight condominium buildings had been commenced and were in various stages of completion; clearing, grubbing and grading for the entire 25-acre condominium and hotel site had been completed; and a 16-inch water line along the nearby Kuhio Highway was being installed.

Just for the period between February 2, 1979 (the date of the Zoning Ordinance) and November 4, 1980 (the date of the 1980 Referendum election), the Developers incurred costs and expenses of approximately $4.3 million.[9] This amount included payments to the County for various fees and permits issued in accordance with the Zoning Ordinance and SMA use permit, as well as expenditures for planning, engineering, architectural and other consultant services, establishing financing for the project, soils testing and digging of injection wells, and other costs directly related to the condominium/hotel project.

The total investment in the property is substantial by any measure. The purchasers of the 136 condominium units have made an aggregate total investment of over $35 million. The hotel—which had been estimated to cost over $48.5 million upon completion—is presently approximately 30 percent complete at a cost of approximately $13.8 million. If the Developers are compelled to terminate the hotel construction contract, they will be required to pay a termination fee of $2,110,000 to the contractor.

The Developers' costs include various public improvements required by, and undertaken and agreed to for the benefit of the County. The Developers already have upgraded Kauai's

---

[9] For the period between February 2, 1979 (the date of the Zoning Ordinance) and January 30, 1980 (the date of certification of the petition), the Developers incurred costs and expenses of approximately $796,000. The Developers' pointed out in their motion for reconsideration to the Hawaii Supreme Court that that court's decision had taken into consideration for this period only the Developers' cash payments rather than their total liabilities incurred.

Wailua-Kapaa water system at a cost in excess of $1,985,000; constructed, at additional expense, a water line with a capacity more than five times that required for their own needs, so as to enable the County eventually to use that line to bring water to a nearby major population center; paid the agreed in-lieu fee of $500,000 to the County; constructed a public access road and public parking; dedicated a public right of way to the beach across the Developer's property; and partially constructed public restroom facilities.[10]

C. Proceedings and Rulings Below

This action was commenced on November 25, 1980, when the County of Kauai filed a Complaint for Declaratory Judgment and Injunctive Relief in the State Circuit Court (Civil No. 2388), naming the Developers and the Committee as respondents. The County sought a declaratory judgment adjudicating the rights of the parties under Section 5.11 of the Charter with respect to the 1980 Referendum and an injunction restraining construction if the court determined that the Developers did not have "vested rights" to continue development.

The Developers filed an Answer on November 26, 1980, and requested a declaratory judgment in their favor.[11] On December 24, 1980, the Committee filed an Answer, Counter-Claims against the County, Cross-Claims against the Developers and a Third-Party Complaint against Mayor Malapit and requested a declaratory judgment in its favor. The Developers answered the Committee's Cross-Claims on January 2, 1981, seeking dismissal of such claims. The County and Mayor Malapit answered the

---

[10] As a condition to final subdivision approval and to insure completion of the subdivision improvements, the Developers deposited with the County security in the amount of $2,436,582.

[11] In *Allen v. City & County of Honolulu*, 58 Haw. 432, 571 P.2d 328 (1977), Hawaii adopted the rule that an action in "inverse condemnation" is not available to determine whether private property has been "taken" by state or local government. Thus, assuming the constitutionality of such a rule (*compare San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981)), if a violation of federal constitutional principles is found in this case, the County of Kauai would have to determine whether to proceed explicitly by eminent domain or whether to permit construction to proceed.

Counter-Claims and Third Party Complaint on January 6, 1981, seeking dismissal of such claims.

On January 5, 1981, the Developers filed a motion for summary judgment, and the Committee filed a motion for partial summary judgment on January 20, 1981. The County of Kauai and Mayor Malapit filed a memorandum in support of the Developers' motion on January 29, 1981. On February 9, 1981, the State Circuit Court granted summary judgment in favor of the Developers, holding, among other things, that the Developers had "incurred substantial expenditures in reliance upon the existing zoning" and had acquired "vested rights to continue and complete" their development and that the County was thus estopped from prohibiting such completion (App. at A-27-28).

The Committee filed its Notice of Appeal from this decision to the Supreme Court of Hawaii on February 27, 1981. No motion for an injunction pending appeal was made by the Committee when it filed its Appeal and no such motion was filed until October 13, 1981. That motion was never decided by the Hawaii Supreme Court.

On October 14, 1982, almost two years after the Referendum—during which time construction proceeded and the Developers' investment multiplied—the Supreme Court of Hawaii reversed the determination of the State Circuit Court. It remanded to the State Circuit Court with instructions to enter summary judgment for the Committee, to revoke the lawfully obtained building permits, to restrain further construction on the Nukolii site, to order refund of the "in lieu" fee paid to the County, and to hear requests for other relief as deemed appropriate (App. at A-25).

The Hawaii Supreme Court held that certification of the 1980 Referendum petition on January 30, 1980, more than nine months prior to the actual vote, meant that the Developers thereafter proceeded at their own risk (App. at A-15-16). The Hawaii court so held despite the fact that (1) it recognized that the Developers had obtained all required approvals or permits *prior* to the 1980 vote (*see* App. at A-4-6, -15); (2) it afforded collateral estoppel effect to the prior State Circuit Court judg-

ment affirming issuance of the SMA use permit and holding that certification did not "suspend" the Zoning Ordinance (App. at A-16); and (3) it did not dispute that the Charter—as then in force—provided in Section 5.11 thereof that a referendum could not affect any vested rights, any action taken, or any expenditure made up to the date of the Referendum[12] (App. at A-9-11). The Hawaii Supreme Court, although recognizing that there was an "absence of statutory ambiguity", nevertheless rejected a "literal" interpretation of this Charter provision (App. at A-10). Instead, that court interpreted Section 5.11 as applying only to "certain persons" under "certain circumstances" (App. at A-9). The court held that, despite Section 5.11, the effect of the Referendum in this case was to halt construction already well under way[13] and to revoke valid building permits lawfully obtained before the Zoning Ordinance was actually repealed by the 1980 Referendum (App. at A-25).

The Hawaii Supreme Court also held, without prior briefing by any party on the federal constitutional issues, that the 1980 Referendum, as construed and applied by that court, "satisfied constitutional requirements" and that "the Developers have no constitutional claim that a taking has occurred" (App. at A-23, -25). The Hawaii Supreme Court, purporting to apply the constitutional principles set forth in the recent land-use decisions of this Court, held specifically that: (a) the result reached "comports with the flexible formula 'for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government' under the fifth and fourteenth amendments" (App. at A-25); and (b) "zoning by referendum is compatible with due process" (App. at A-23). This was the first occasion in these proceedings that the federal constitutional questions on appeal to this Court arose.

---

[12] The date of the Referendum was held to be the date of vote (*i.e.*, November 4, 1980), by the State Circuit Court (App. at A-28) and also by the Hawaii Supreme Court (App. at A-11).

[13] As discussed, approximately $4.3 million in costs had been incurred by the Developers as of November 4, 1980. *See* note 9 and accompanying text, *supra*.

Clearly, the constitutional validity of the 1980 Referendum and Article V of the Kauai County Charter, as construed and applied, was raised and drawn into question by the Hawaii Supreme Court's decision, and the validity of such statutes was upheld by the Hawaii Supreme Court. Where, as here, federal constitutional claims have been actually decided and passed upon by the highest state court, this Court's jurisdiction is properly invoked. *See Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *WHYY, Inc. v. Glassboro*, 393 U.S. 117, 119 (1968); *Coleman v. Alabama*, 377 U.S. 129, 133 (1964); *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185-186 (1945). *See also* R. Stern and E. Gressman, Supreme Court Practice § 3.28 (5th ed. 1978).

On November 15, 1982, the Developers filed their Motion for Reconsideration. A separate Motion for Reconsideration was filed by the County of Kauai on November 1, 1982.

In their Motion for Reconsideration, the Developers asserted that, in holding that the 1980 Referendum and Charter provisions were constitutionally valid as construed and applied, the Hawaii Supreme Court overlooked and misapprehended the applicable constitutional principles as stated by the Court. The Developers specifically asserted, among other things, that the 1980 Referendum and Article V of the Charter, as construed and applied by the Hawaii Supreme Court, violated applicable provisions of the United States Constitution, including the Due Process Clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment as incorporated in the Fourteenth Amendment.

The motions for reconsideration were denied on December 6, 1982, without opinion, in a *per curiam* order of the Hawaii Supreme Court (App. at A-72).

The judgment of the Hawaii Supreme Court was then entered on December 27, 1982 (App. at A-70).

THE QUESTIONS ARE SUBSTANTIAL

A. The Takings Issue

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that no state shall "deprive any person of life, liberty, or property, without due process of law." The Fifth Amendment to the United States Constitution directs that "private property [shall not] be taken for public use, without just compensation." Such guarantee is applicable to the States through the Fourteenth Amendment. *Penn Central, supra*, 438 U.S. at 122; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 499 U.S. 155, 160 (1980); *Chicago, B. & O. R.R. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

The decision of the Hawaii Supreme Court permits what no state or municipality may do consistent with the Fourteenth Amendment — abort in midstream construction which had commenced, after building permits were validly issued and all other governmental approvals were properly obtained, on a single parcel of property, without resort to the eminent domain power and payment of just compensation. The 1980 Referendum and Article V of the Kauai County Charter (including Section 5.11 thereof), as construed and applied by the Hawaii Supreme Court, violate the Fourteenth Amendment and are constitutionally invalid as applied to the Developers. In holding otherwise, the Hawaii Supreme Court cited and referred to a number of the relevant decisions of this Court construing the constitutional prohibition against uncompensated takings. As pointed out hereafter, the decision of the Hawaii Supreme Court on the federal constitutional questions raised on this appeal conflicts with the applicable decisions of this Court. *See* Sup. Ct. R. 17.1(c). Thus, the federal constitutional questions raised here are substantial and warrant this Court's review under its appeal jurisdiction or, in the alternative, under its certiorari jurisdiction.[14]

---

[14] The Hawaii Supreme Court stated that it was deciding a case of first impression on the effect of the Referendum (*see* App. at A-7). At the beginning of this Term, this Court declined to construe a section of the Bankruptcy Code of 1978 (11 U.S.C. § 522(f)(2)) in a manner that would result in its retroactive effect, in part to avoid determining whether such retroactive application would

This Court has long recognized that, while property use may be regulated under the police power, if regulation "goes too far" such regulation constitutes a "taking" within the meaning of the Takings Clause of the Fifth Amendment. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The Court has recognized that police power regulations, including zoning ordinances, can destroy the use and enjoyment of private property and constitute an unconstitutional taking of property. *E.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, ___U.S. ___, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) (use of air-space rights for cable television wiring must be compensated); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (navigational servitude for public right of access is compensable); *Nectow v. City of Cambridge*, 277 U.S. 183 (1928) (zoning ordinance which precluded landowner from any "practical use" of his land violates Fourteenth Amendment); *Pennsylvania Coal Co. v. Mahon*, *supra*, (state regulation making it commercially impossible to mine coal is a "taking").

This Court also has made clear that a "taking" may occur without a total destruction or deprivation of property rights. The denial of a fundamental right attached to the concept of property entitles the owner to compensation. *Loretto v. Teleprompter Manhattan CATV Corp.*, *supra*, 73 L.Ed.2d at 884 and n.16; *Kaiser Aetna*, *supra*, 444 U.S. at 179; *United States v. Dickinson*, 331 U.S. 745, 750-751 (1947) (owners of property flooded by Government dam project must be compensated); *United States v. Causby*, 328 U.S. 256, 261-62 (1946) (frequent low

---

violate the Takings Clause. *United States v. Securities Industrial Bank*, ___ U.S. ___, 103 S.Ct. 407, 74 L.Ed.2d 235, 245 (1982). In their Motion for Reconsideration the Developers likewise urged the Hawaii Supreme Court to avoid the federal questions on this appeal by not applying the 1980 Referendum and its interpretation of Section 5.11 of the Charter retroactively to the Developers' property. The retroactive nature of the Hawaii Supreme Court's decision provides additional support for the proposition that an unconstitutional "taking" occurred. *See, e.g., United States v. Security Industrial Bank*, *supra*; *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971); *Welch v. Henry*, 305 U.S. 134, 147 (1938); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930); *Muhlker v. New York and Harlem R.R. Co.*, 197 U.S. 544 (1905). *See also*, C. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

altitude flights of military aircraft over property constitutes a "taking"). *See also San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting opinion).

The decision in *Kaiser Aetna, supra*, is particularly pertinent as to the applicability of the foregoing principles to the facts here. There, the property owner had invested "substantial amounts of money" in making improvements on its property in connection with a marina style subdivision development, 444 U.S. at 178. There, as here, as this Court noted, the government "could have refused to allow" the improvements but did not do so, 444 U.S. at 179. There, as here, the developer proceeded with its planned development, *id.* Thereafter, in *Kaiser Aetna*, the government sought to create a public right of access to the improved pond, destroying a fundamental element of the developer's property right — the ability to exclude others, *id.* That being the case, the Court went on to find that the government had not exercised its regulatory power in a manner that would cause merely an "insubstantial devaluation of petitioner's private property" and therefore found a "taking." 444 U.S. at 180.

In the case at bar, the Hawaii Supreme Court equated the question of whether there was a constitutional "taking" within the meaning of the Fourteenth Amendment with whether there was "estoppel" or "vested rights" which barred governmental action under state law (App. at A-10, -24-25). Having concluded that governmental action was not barred under state law, the Hawaii Supreme Court went on to hold that its state law analysis also "resolve[d] these constitutional considerations against the Developers" (App. at A-24). By contrast, in *Kaiser Aetna*, this Court, after noting that it was unquestioned that Congress could compel access by the public to a private waterway, held that whether such access amounted to a "taking" was "an entirely separate question." 444 U.S. at 174 (footnote omitted). *See also Loretto v. Teleprompter Manhattan CATV Corp., supra*, 73 L.Ed.2d at 875-76 (legitimate public purpose in rapid development of cable television unquestioned but whether the regulation constituted a "taking" is a "separate question"). Similarly here, the question of whether resort development at Nukolii

could have been stopped by the County under state law is separate from the question of whether, under the Fifth and Fourteenth Amendments, such action under the circumstances here presented constitutes a "taking" of the Developers' property.

Whether a particular action constitutes a "taking" does not depend on the landowner's rights having matured to the point of constituting "vested rights" or producing an "equitable estoppel" but rather on the nature and extent of the property right being invaded. *Kaiser Aetna, supra,* 444 U.S. at 179. Government consents such as those detailed above thus, as this Court has stated, "can lead to the fruition of a number of expectancies embodied in the concept of 'property'" such that their deprivation constitutes a "taking" — as here — within the meaning of the Clause. *Id.*

With specific respect to regulation through zoning, as the Hawaii Supreme Court itself recognized, while zoning constitutes a legitimate exercise of the police power, there are plainly constitutional limitations to its exercise (App. at A-23).[15] In some cases, land-use restrictions are permissible and may be justified where (a) the landowner may still realize his contemplated investment expectations and (b) the regulation is a part of a general comprehensive scheme (so that the landowner shares in the benefits of the overall zoning plan), and is not selectively aimed at a single parcel of property. *E.g., Agins v. City of Tiburon,* 447 U.S. 255, 262 (1980), and *Penn Central, supra,* 438 U.S. at 133-35. In other cases, where there is a substantial invasion of investment expectations or the use restrictions are not part of an overall scheme, the fact that such restrictions are imposed under a local government's police power does not prevent application of the Takings Clause. *E.g., Nectow v. City of Cambridge, supra,* 277 U.S. at 187-89; *see also Pennsylvania Coal, supra,* 260 U.S. at 413-415.

---

[15] This Court has held that the promotion of the "public health, safety, morals or general welfare" are permissible aims of the States' zoning power. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

In the instant case, *none* of these factors that traditionally save zoning restrictions from conflict with the Takings Clause is present.

In *Agins, supra,* this Court, in affirming that the rezoning there was not an unconstitutional "taking", observed that the developers were still "free to pursue their reasonable investment expectations." 447 U.S. at 262. Likewise, in *Penn Central,* this Court noted that the New York City landmarks law permitted Penn Central not only to continue to maintain Grand Central Terminal but also to obtain a "reasonable return" on its investment, 438 U.S. at 136. This Court further noted that Penn Central still retained valuable rights by its ability to transfer the air rights over the Terminal to other parcels of land. Hence, the Court concluded that those rights mitigated whatever financial burdens the landmarks law imposed on the landowner and took such benefits into account in considering the impact of, and validating, such law, 438 U.S. at 137.

The rationale of both *Agins* and *Penn Central,* as well as *Kaiser Aetna,* support the fact that the 1980 Referendum "goes too far" and is unconstitutional as applied to the case at bar. The underlying facts are both stark and clear:

— The numerous necessary permits had been obtained, construction was in progress and over $4.3 million in costs already had been incurred at the time of the Referendum vote. The Developers continued to build in reliance upon the clear meaning of Section 5.11 of the Charter that no referendum could affect rights vested, actions taken or expenditures made before the date of the referendum vote. Moreover, the Developers' reliance was bolstered by the Opinion of the County Attorney that certification of the petition did not suspend the County's authority to issue the building permits and the July 7, 1980 State Circuit Court judgment which, in effect, confirmed that Opinion.

— As matters stood at the time of the Hawaii Supreme Court decision, all 150 condominiums on the Nukolii site had been completed and 131 were occupied. The hotel was (and remains)

approximately thirty percent complete — its superstructure erected — its construction halted upon the rendering of the decision. Almost $50 million had been invested in the development by the time of the Hawaii Supreme Court decision in October, 1982.

Where property use is impaired when landowners have proceeded as far as the Developers have here, a "taking" occurs. *See Kaiser Aetna, supra,* 444 U.S. at 180. Application of the 1980 Referendum to the Developers' land clearly prohibits them from using their property as a resort and deprives them of their "distinct investment-backed expectations". *Kaiser Aetna, supra; Penn Central, supra. See also, e.g., Pennsylvania Coal Co. v. Mahon, supra.*[16]

The Hawaii Supreme Court held that the Developers' expectations for use of their property should not be taken into account for any period after the 1980 Referendum was certified (App. at A-24) — notwithstanding the fact that the Nukolii site had been designated as a resort area since 1977 and the Developers had incurred substantial costs with respect to their resort project. We do not believe that the Hawaii Supreme Court's reasoning in this regard can support, as a matter of constitutional law, the result reached by that court.

First, the Developers' "investment-backed" expectations clearly predated and preexisted the certification of the Referendum (and, indeed, motivated those who sponsored the Referendum).

Second, as the Hawaii Supreme Court itself recognized, no principle of Hawaii law even implied that certification—which requires the concurrence of only twenty percent of the number

---

[16] In addition, the Developers were required to provide, among other things (*see* pp. 5, 11-12, *supra*), a public right-of-way to the beach across and alongside their property as a condition to the development that has now been halted — all without any compensation by the County — the precise situation which was found to constitute an unconstitutional "taking" in *Kaiser Aetna, supra,* as well as a "taking per se" in *Loretto v. Teleprompter Manhattan CATV Corp., supra.*

of voters registered for the last general election—required the Developers to cease development.

Third, from a constitutional viewpoint, the effect of the Hawaii Supreme Court's holding is simply to exacerbate the deprivation of the owner's use of its property — since the owner would be unable, as a practical matter, to develop its property in accordance with the only existing lawful zoning designation once a referendum were *certified*. Thus, the owner could proceed only at its peril, even though the zoning on its parcel had not actually been changed but only *might* change. The inevitable result would be that the owner would be deprived of any meaningful use of the property; in short, the property would be "sterilized" until the referendum was voted up or down.

Apart from the obvious point that the Developers here had gone too far to have their rights terminated — and retroactively at that — a second but related set of principles developed in the cases decided by this Court has been violated by the result below. This Court never has sanctioned — and, indeed, has condemned — action in the guise of "zoning" which, rather than being designed to regulate land-use in a reasonably comprehensive manner, is aimed specifically and solely at restricting a particular developer on a particular parcel from proceeding lawfully to utilize its property rights. One cannot imagine a case which more starkly illustrates this abuse than the case at bar — in which the 1980 Referendum had no purpose, effect or coverage save to stop the construction in progress on the Nukolii site. Except for the Developers' single parcel at Nukolii, no other property anywhere situated was affected, either actually or potentially.

This Court has invalidated zoning ordinances which were *not* part of a general comprehensive scheme or which were aimed selectively at a single parcel of property. *See, e.g., Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912). *Compare Agins, supra*, 447 U.S. at 261, 262; *Penn Central, supra*, 438 U.S. at 134-135; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S.

at 395. Such a result follows from the traditional justification for permitting the imposition of reasonable land-use restrictions without requiring compensation, *i.e.*, that both the economic burdens and the aesthetic benefits of comprehensive planning will be shared equally by similar landowners. *Cf.*, *Agins*, *supra*, 447 U.S. at 262; *Penn Central*, *supra*, 438 U.S. at 133-35. It likewise follows because the guarantee against taking without just compensation is "designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole." *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, 450 U.S. at 656 (Brennan, J., dissenting), *citing Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The Hawaii Supreme Court evidently construed the decision in *Penn Central*, *supra*, as departing from this principle, since it relied on that case for the proposition that the result in the instant case "comports with the flexible formula 'for determining when "justice and fairness" require [compensation] . . .' under the fifth and fourteenth amendments" (App. at A-25). But *Penn Central*, far from supporting application of a "flexible formula" to the *ad hoc* suspension of activity at the Nukolii site, explicitly indicates why such application cannot be sustained.

In *Penn Central*, this Court most clearly focused its attention on the particularistic nature of the designation of Grand Central Terminal as a "landmark" subject to special protection; but this Court found that the landmark preservation law at issue there did not impose — as here — drastic land-use limitations *and* that the designation of an individual structure as a "landmark" was justifiable because such designation was part of a comprehensive statutory plan, 438 U.S. at 133-35.

The opposite, of course, is true here. The 1980 Referendum superimposed on existing comprehensive land-use planning — the designation in state land-use boundaries and in the County General Plan, as well as in the final zoning effected by the Zoning Ordinance itself — a change in zoning for one single spot, the Nukolii site, sponsored and designed by appellee Committee to halt the development of the Nukolii site which was then and there proceeding.

Because the rezoning of the Nukolii site was effected by referendum, the Hawaii Supreme Court viewed the case presented as "one of first impression . . . involving a conflict between the private interest of the landowners . . . and the public interest of the electorate to effectively determine what the land use policy shall be" (App. at A-7). Relying on this Court's approval in *Eastlake, supra*, 425 U.S. at 679, of the referendum process as a "basic instrument of democratic government", the Hawaii Supreme Court stated that it would reject a "literal" interpretation of the "grandfather" clause set forth in Section 5.11 of the Charter because "such construction would produce an absurd and unjust result" (App. at A-10-11), *i.e.*, that the development at the Nukolii site could proceed. Accordingly, it reached a non-"literal" result; more plainly put, it refused to apply Section 5.11 as written. Then, relying in part on the validation of the zoning referendum process at issue in the *Eastlake* decison, the Hawaii Supreme Court held that the result produced by its non-"literal" construction of Section 5.11 met constitutional standards (App. at A-25).[17]

The Hawaii Supreme Court's application of the decision in *Eastlake* thus raises a critical constitutional question as to the permissible limits of "zoning by referendum" to stop ongoing lawful development of a particular parcel of property. The decision in *Eastlake* did not approve the *ad hoc* use of a general referendum power to reverse retroactively existing zoning to the detriment of a particular landowner. To the contrary, *Eastlake* involved a due process challenge to a scheme requiring *all* local zoning changes to be approved by referendum. All persons were thus on notice that they could not rely on a zoning ordinance until it was so validated.

Even in that circumstance, this Court noted that the validity of the zoning classification itself in *Eastlake* could have been, but was not, challenged under the Takings Clause, *see* 426 U.S.

---

[17] This novel interpretation of Section 5.11 was, of course, totally unexpected in light of the clarity of its unambiguous language. To apply this unexpected interpretation retroactively is to compound the constitutional violations. *See* note 14, *supra*, and the cases cited therein.

at 676-77, which the Hawaii Supreme Court failed to note. Such a challenge clearly lies under the facts here presented — since a referendum enacted by the people cannot accomplish what a state or municipaltiy is forbidden to do directly under the Constitution, *Eastlake, supra*, 426 U.S. at 676, *citing Hunter v. Erickson*, 393 U.S. 385, 392 (1969).

The protections against uncompensated takings were ignored by the Hawaii Supreme Court. The application of the 1980 Referendum "extinguish[ed] a fundamental attribute of ownership". *Agins, supra*, 447 U.S. at 262; *Kaiser Aetna, supra*, 444 U.S. at 179. The objective of the 1980 Referendum was to have the Developers' property "remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved". Thus, "in this sense the property is being 'used' by the public." *San Diego Gas & Electric, Co. v. City of San Diego, supra*, 450 U.S. at 652, n.18 (dissenting opinion, quoting from the lower court); and compensation plainly is required.

B. The Other Due Process Issues

A separate federal constitutional issue arises from the Hawaii Supreme Court's incorrect reliance, again, on *Eastlake*, in holding that rezoning of the Developers' property "by referendum is compatible with due process" (App. at A-23). In so holding, the Hawaii Supreme Court badly misconstrued *Eastlake*. The court evidently read *Eastlake* as providing an instant answer to any due process claim so long as the challenged result was implemented by a referendum. Far from vindicating the result reached by the Supreme Court of Hawaii, the opinions in *Eastlake* demonstrate that the rezoning of the Developers' property by the 1980 Referendum offends the traditional due process guarantees embodied in the Fourteenth Amendment.

Eastlake involved a due process challenge to a legislative scheme in which *all* local zoning changes had to be approved by referendum within a stated period of time. Accordingly, *Eastlake* did not resolve the questions as to (a) whether, as the Supreme Court of Hawaii held in effect, due process permits a landowner's rights to be frozen and the use of his land to be sterilized once a relatively small minority of voters places on the

ballot a proposed *ad hoc* rezoning of such owner's property, and (b) whether the ability of even a majority of the voters retroactively to void existing zoning on particular parcels of property — on wholly *ad hoc* grounds and without reference to the overall standards that must guide zoning decisions by governmental bodies (and that determine whether action by such bodies survives judicial review) — creates such arbitrary results as to violate due process.

While *Eastlake* did not directly resolve these issues, the opinions in that case contained very explicit warnings against both of these due process infirmities.

In *Eastlake*, this Court expressly admonished against the situation which has been created by the Hawaii Supreme Court — delegation of the zoning power "by the legislature to a narrow segment of the community, not to the people at large." 426 U.S. at 677 (emphasis by the Court). *See also, e.g., Larkin v. Grendel's Den*, ___U.S. ___, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982); *Penn Central, supra*, 438 U.S. at 123, n.25; *Washington ex rel. Seattle Title Trust Co. v. Roberge, supra*, 278 U.S. at 122.

Such delegation to a minority is the practical effect of the Hawaii Supreme Court's holding, as discussed *supra*, that the Developers could have no vested rights under the Charter and proceeded at their peril once the Referendum petition was certified. In effect, under this construction, a "freeze" on development is mandated upon certification, *see* p. 22, *supra*. The power to impose the "freeze" has in turn been delegated to a small minority, since certification here involves signature by a number of persons equal to only twenty percent of Kauai's registered voters at an election held two years before. The result is that the landowner's use of his land is effectively stopped by a minority of the voters — irrespective of what the majority wants.

Aggravating the due process violation, the "freeze" thus imposed by a small minority is likely to last for a very substantial period of time. Whereas the Eastlake City Charter precluded excessive delays in the referendum procedure by requiring the referendum to occur within a short specified period (60-120

days) after the local planning commission passed a zoning action, 426 U.S. at 670-71 n.1, the Kauai County Charter contains no such time requirement as to when a referendum may be initiated. In fact, although the Zoning Ordinance was enacted on February 2, 1979, the Committee's Referendum petition was not certified until January 30, 1980, nearly one year later, and the vote did not repeal the Zoning Ordinance until the election results themselves were certified on November 25, 1980 (App. at A-6, -81). Even after a referendum petition is certified, it is conceivable that a referendum may not be held for more than two years if the referendum is certified too late for the nearest general election and if no special election is called (*see* App. at A-81). If the warning in *Eastlake* against delegations to narrow segments of the population means anything, it surely prevents the effective "freeze" of land use which the Hawaii Supreme Court decision imposes as soon as a relatively small minority gathers signatures sufficient to initiate a referendum.

The second of the *Eastlake* warnings against unconstitutional use of the referendum process likewise finds its appropriate target in the case at bar. As the majority in *Eastlake* acknowledged, the Due Process Clause guarantees against arbitrary and capricious deprivation of rights. *See also Village of Euclid v. Ambler Realty, supra,* 272 U.S. at 395 (discussed by the majority in *Eastlake,* 426 U.S. at 676-77). Without question, this guarantee applies just as surely to results effected by referendum as it does to any other governmental action. With respect to the due process claim in *Eastlake,* the Court stated:

> If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction.

426 U.S. at 676. The dissenting justices in *Eastlake* elaborated on these due process concerns in connection with *ad hoc* referenda affecting land-use. Justice Powell stated:

> The "spot" referendum technique appears to open disquieting opportunities for local government bodies

> to bypass normal protective procedures for resolving issues affecting individual rights.

426 U.S. at 680 (Powell, J., dissenting). Similarly, Justice Stevens wrote:

> The essence of fair procedure is that the interested parties be given a reasonable oppoortunity to have their dispute resolved on the merits by reference to articulable rules.

426 U.S. at 692-93 (Stevens, J., dissenting). Justice Stevens also noted, and concurred with, the well-recognized land-use doctrine discussed above — overlooked by the Hawaii Supreme Court — that a comprehensive plan is the *"very essence of zoning"*, 426 U.S. at 690-91, n.12 (emphasis by Justice Stevens; citation omitted), and the cases discussed thereat.

The majority in *Eastlake* did not have occasion to apply the foregoing principles in that case, since the possibility of arbitrary and capricious results there were minimal. The referendum process in *Eastlake* could be used only to determine whether or not to validate an ordinance at the time of its passage and thus no discretion existed by which voters could reach an *ad hoc* result outside the general statutory scheme.

By contrast, in the instant case, any zoning decision may be implemented (by initiative) or withdrawn (by referendum) irrespective of its consistency with the statutory scheme. The case at bar, of course, is a perfect example of what can happen in this connection; the effect of the 1980 Referendum was to zone the Nukolii site as "agriculture", notwithstanding the fact that, pursuant to Hawaii's comprehensive scheme of planning, the State of Hawaii has designated the parcel as "urban" (since 1976) and the Kauai County General Plan, in conformity with the State's designation, designates the land as a "resort" (since 1977). Thus, the voters of Kauai did what state law prohibited the County Council from doing: zoning the Nukolii site in a manner directly violative of both the County General Plan and the State Land Use designation. In federal constitutional terms, what happened here — a bill of attainder by plebiscite aimed at a particular

parcel of property — was the imposition of zoning without reference to the standards imposed by a general statutory scheme. Zoning without such standards has been specifically condemned by this Court. *Eubank v. City of Richmond, supra*, 226 U.S. at 143-144; *Washington ex rel Seattle Title Trust Co. v. Roberge, supra*, 278 U.S. at 121-22.

In short, *Eastlake* did not purport to be a license for arbitrariness by referendum. It did not elevate legislation by referendum to a position immune from constitutional scrutiny; it simply recognized that — in certain circumstances — the referendum process can supplement the legislative process. The Hawaii Supreme Court was wrong in relying on *Eastlake* to hold that the Referendum aimed at the Nukolii development was "compatible with due process" simply because it was "zoning by referendum".

C. Impact of the Hawaii Supreme Court's Decision

Unless the decision of the Supreme Court of Hawaii is reversed, the case will stand as a clear message to investors in the State of Hawaii — spreading quickly to other states as well — that no holds are barred in extinguishing property rights, so long as the action taken is labelled "zoning" and is effected through "legislation by plebiscite" (App. at A-9).[18] The effect on investment in Hawaii — and elsewhere — can only be deleterious.

Justice Holmes stated in *Pennsylvania Coal* that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416. To the extent that the decision below stands, that principle falls.

---

[18] The use of referenda in zoning matters has become widespread. *See, e.g.*, Cal. Const. art. VI, § 5; Colo. Const. art. V, § 1; Fla. Const. art. VI, § 5; Maine Const. art. IV, pt. 3, §§ 17-21; Mich Const. art. II, § 9; Or. Const. art. IV, § 1; Cal. Elec. Code §§ 4000-4061; Colo. Rev. Stat. §§ 1-40-115, -116; Mich. Comp. Laws § 117.4i(6). As of 1978, twenty-two state constitutions expressly provided for initiatives and referenda at either the state or local level. *See* discussion in Note, *Developments in the Law — Zoning*, 91 Harv. L. Rev. 1427, 1528-42 (1978). It requires no hyperbole to predict that the Hawaii decision, if left to stand, will be contagious.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal or, in the alternative, should grant certiorari.

March 5, 1983

Respectfully submitted,

LEON SILVERMAN, P.C.
One New York Plaza
New York, New York 10004
(212) 820-8080

Counsel for Appellants
Pacific Standard Life
Insurance Company and
Graham Beach Partners

FRED P. BOSSELMAN, P.C.
Ross & Hardies
One IBM Plaza
Chicago, Illinois 60611
(312) 467-9300

WALTON D. Y. HONG
Masuoka & Hong
P.O. Box 1727
Lihue, Hawaii 96766
(808) 245-4757

EDWARD A. JAFFE
Cades Schutte Fleming &
Wright
1000 Bishop Street
P.O. Box 939
Honolulu, Hawaii 96808
(808) 521-9200

SHELDON RAAB, P.C.
Fried, Frank, Harris,
Shriver & Jacobson
(A partnership which
includes
professional corporations)
One New York Plaza
New York, New York 10004
(212) 820-8090

FRANCIS A. WONG
Rice, Lee & Wong
345 Queen Street
Honolulu, Hawaii 96813
(808) 536-4421

Of Counsel

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

COUNTY OF KAUAI,
Petitioner-Appellee,

v.

PACIFIC STANDARD LIFE INSURANCE COMPANY, GRAHAM BEACH PARTNERS,
Respondents-Appellees,
and COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant,

vs.

EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Third Party Defendant-Appellee

NO. 8267

APPEAL FROM THE FIFTH CIRCUIT COURT

HONORABLE KEI HIRANO, JUDGE

(CIVIL NO. 2388)

OCTOBER 14, 1982

RICHARDSON, C.J., LUM, J., CIRCUIT JUDGE GREIG IN PLACE OF NAKAMURA, J., RECUSED, AND RETIRED JUSTICES OGATA AND MENOR ASSIGNED TEMPORARILY

MUNICIPAL CORPORATIONS—ordinances and bylaws in general—matters subject to referendum in general.

Kauai County Charter provision empowering voters to approve or reject ordinances by referendum is a clear exception to the general reservation of legislative power to the county council and, subject to certain exceptions, all ordinances,

including zoning changes, enacted after January 2, 1977 are subject to the referendum power.

SAME—same—same.

Kauai county charter provision providing that a referendum shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum is primarily an embodiment of equitable estoppel theory.

STATUTES—construction and operation—general rules of construction—literal and grammatical interpretation.

Even in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act.

ZONING AND PLANNING—enforcement of zoning regulations—defenses to enforcement—estoppel.

The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approval will be forthcoming in due course, and he may safely proceed with the project.

SAME—same—same—same.

Final discretionary action on the part of government constitutes official assurance which may reasonably be relied upon for zoning estoppel purposes.

SAME—same—same—same.

If a developer has not received final discretionary action under the permit system before the certification of a referendum to alter the underlying zoning, estoppel analysis will recognize that timely intervention of the referendum proce-

dure has made discretionary approval or disapproval of underlying zoning an integral part of the development process as applied to that project.

SAME—same—same—same.

Developers who had not yet obtained final discretionary governmental action on their project prior to the filing of a referendum to alter underlying zoning had, for the purposes of equitable estoppel, no right to rely upon any governmental assurances made before the referendum vote.

SAME—same—same—same.

Zoning estoppel is not intended to protect speculative business risks, thus, an expenditure made in compliance with underlying zoning but before final discretionary action by government will be disregarded for estoppel purposes.

SAME—same—same—same.

There can be no estoppel effect to deny permit revocation where claimed substantial expenditures are not made in good faith.

SAME—same—same—vested rights.

Vested rights analysis focuses upon whether the owner or developer acquired real property rights which cannot be taken away by governmental regulation.

SAME—same—same—same.

When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry in determining whether his development rights have vested is whether his actions constituting irrevocable commitments were reasonably made or were merely speculative business risks.

OPINION OF THE COURT BY RICHARDSON, C.J.

This appeal considers the effect of a county referendum nullifying a zoning ordinance that had authorized resort development at Nukolii, Kauai, when (1) the referendum petition drive

began before the developers applied for any government permits, (2) the referendum issue was certified before any permits were issued, and (3) the referendum vote occurred after the county government had approved the developers' resort plans and had issued building permits. The parties involved as Appellees are Pacific Standard Life Insurance Co. and Graham Beach Partners (hereafter referred to as the Developers) and the County of Kauai and its mayor (hereafter referred to as the County). Appellant is Committee to Save Nukolii, an unincorporated association of Kauai County residents who represent the referendum petitioners and oppose resort development at the Nukolii site.

On the day the referendum results were certified, the County filed this action for declaratory judgment and injunctive relief, asking the circuit court to determine the relative legal rights and duties of the respective parties pursuant to the initiative and referendum article of the county charter. In granting the Developers' motion for summary judgment, the lower court ruled that they had acquired vested rights to the resort development and that the County was equitably estopped from prohibiting the development notwithstanding that the electorate had, by a nearly 2-1 margin, disapproved the rezoning ordinance. We reverse.

I.

We agree with the lower court that there is no genuine issue of material fact to be determined. On appeal from summary judgment, our function therefore is to resolve questions of law applicable to the undisputed facts contained in the record.

General comprehension of the controversy may be obtained from the following chronological outline of events:

1. In 1974, the Developers purchased the subject shoreline property, comprising 60.425 acres located at Hanamaulu, Kauai,

and known as Nukolii. The land use classification then was open space and agriculture, which did not allow resort development.[1]

2. In November 1977, the Kauai County General Plan was amended to designate the parcel as "resort." The Developers subsequently sought an amendment to the Comprehensive Zoning Code, proposing to build three hotels of 500 rooms each on the 60.425-acre parcel. On February 1, 1979, the Kauai County Council amended the zoning code from "open/agriculture" to "resort", but the ordinance scaled down the original proposal to first-phase development of 150 condominium units and one 350-room hotel on 25 acres plus payment to the County of an "in lieu" fee for recreational facilities totalling $500,000. The mayor approved the ordinance on February 2, 1979. A month later, Appellant circulated the petition to repeal the resort zoning ordinance pursuant to the referendum provisions of the county charter.

3. On December 27, 1979, Developers applied for a Special Management Area use permit. Thereafter, on January 15, 1980, Appellant submitted the referendum petition to the County and on January 23 was allowed to intervene in the planning commission proceedings on the Developers' permit application.

4. On January 30, 1980, the county clerk certified the referendum petition, containing more than 4,000 signatures, as sufficient under the pertinent charter provisions. On February 5, 1980, the Kauai County Council sustained the resort zoning

---

[1] The State exercises land use control by designating urban, rural, agriculture, and conservation use boundaries, H.R.S. ch. 205 (1976 & Supp. 1981), for which the counties provide detailed maps. In 1976, the State changed the agriculture designation of the Nukolii parcel to urban, leaving only eight acres in the conservation or open space category. Conforming amendments to the Kauai County General Plan and the more specific County Comprehensive Zoning Code were required before the permit system could proceed. *See* Neighborhood Bd. No. 24 v. State Land Use Comm'n, 64 Haw. ___, 639 P.2d 1097 (1982); H.R.S. § 205-4.5 to -5 (1976 & Supp. 1981). In addition, the Coastal Zone Management Act, H.R.S. ch. 205A (Supp. 1981), required county special management area use permit approval before any other necessary permits could be issued, including county building permits authorizing actual construction.

ordinance and placed the referendum question on the1980 general election ballot.

5. On April 9, 1980, being advised by legal counsel that certification of the petition did not suspend the resort zoning ordinance, the Kauai County Planning Commission approved the Developers' application for a Special Management Area use permit. Appellant timely appealed the planning commission's decision and the no-suspension ruling. The circuit court affirmed both decisons on July 7, 1980, and the judgment in that proceeding was appealed to this court but later withdrawn.

6. On August 4, 1980, the Developers applied for building permits for the hotel and condominium structures. The County issued permits covering the 150 condominium units the next day.

7. On August 27, 1980, Appellant sought an injunction to prohibit construction pursuant to the condominium building permits, alleging they were not validly issued. The circuit court denied the request for injunctive relief on September 5.

8. On November 3, 1980, the County issued a building permit for construction of a 350-room hotel on the Nukolii site. Four of the six departmental signatures necessary for the permit were obtained this day.

9. On November 4, 1980, the electorate approved the referendum to repeal the resort zoning ordinance by a vote of 10,794 to 5,618. The election results were certified by the county clerk on November 25.

The County filed this action on November 25, 1980, naming the Developers and Appellant as parties, and later supported the Developers' motion for summary judgment. Appellant filed several counterclaims, cross-claims, and third-party complaints against the mayor. The lower court dismissed these claims and Appellant's related motion for partial summary judgment on February 9, 1981, and concurrently granted the Developers' motion for summary judgment. Finding first that certification of the petition did not suspend the zoning ordinance and that all

permits were validly issued, the circuit court concluded as follows:

> The Court further holds that Respondents Pacific Standard Life Insurance Company and Graham Beach Partners, having incurred substantial expenditures in reliance upon the existing zoning, did acquire vested rights to continue and complete the condominium and hotel project at Nukolii. This conclusion is based upon . . . [section 5.11 of the Kauai County Charter.] The vesting occurred prior to the issuance of the condominium building permits on August 5, 1980, and prior to the date of the referendum which the Court deems to be November 4, 1980.
>
> The Court also holds that the County of Kauai is equitably estopped from prohibiting the continuation and completion of the Nukolii project. This holding is based on *Denning* v. *County of Maui*, 52 Haw. 653, [485 P.2d 1048 (1971);] *Allen* v. *City & County of Honolulu*, 58 Haw. 432, [571 P.2d 328 (1977);] *Life of the Land* v. *City Council*, 60 Haw. 446, [592 P.2d 26 (1979);] and *Life of the Land* v. *City Council*, 61 Haw. 390, [606 P.2d 866 (1980).]

Decision, Order and Judgment 2-3 (Feb. 9, 1981).

II.

The issue before us is one of first impression in this juridiction, involving a conflict between the private interest of the landowners to develop their property and the public interest of the electorate to effectively determine what the land use policy shall be. Resolution of this issue must begin with the Kauai County Charter, which is the source of the electorate's power.

Article V of the charter, establishing initiative and referen-

dum procedures, was adopted in 1976.[2] The referendum process is "a basic instrument of democratic government." *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976). Accordingly, it is a clear exception to the general reservation of

---

[2] Our discussion will refer to the following provisions of article V, not otherwise quoted in the text, that were in effect at all times relevant to this appeal:

> Section 5.02. Limitations to Powers. The initiative power and the referendum power shall not extend to any part or all of the operating budget or capital budget; any financial matter relating to public works; any ordinance authorizing or repealing the levy of taxes; any emergency legislation; any ordinance making or repealing any appropriation of money or fixing the salaries of county employees or officers; any ordinance authorizing the appointment of employees; any ordinance authorizing the issuance of bonds; or any matter covered under collective bargaining contracts.
>
> Section 5.03B. Voters seeking referendum on an ordinance shall submit a referendum petition addressed to the council, identifying the particular ordinance and requesting that it be either repealed or referred to the voters of the county.
>
> Section 5.03C. Each initiative or each referendum petition must be signed by not less than twenty percent (20%) of the number of eligible registered voters in the last preceding general election.
>
> Section 5.07. County Council Action On Petitions. A. The county council shall proceed immediately to consider an initiative or referendum petition which has been determined sufficient in accordance with the provisions of this article. . . . If a referendum petition is concerned, the ordinance to which that petition is directed shall be reconsidered by the council; and not later than thirty (30) days after the date on which the petition was determined sufficient, the council shall, by ordinance, repeal, or, by resolution, sustain the ordinance.
>
> . . .
>
> C. The council may, in its discretion, and under appropriate circumstances, provide for a special election.
>
> Section 5.09. Results of Election. . . . If a majority of the voters voting upon a referendum ordinance shall vote against it, the ordinance involved shall be considered repealed upon certification of the election results.
>
> Section 5.10. Upon approval by a majority of the votes cast on the proposal, the charter amendment shall take effect upon all legislative acts not excluded herein enacted after January 2, 1977.

legislative power to the Kauai County Council.[3] "The power of the voters to approve or reject ordinances that have been passed by the county council . . . shall be the referendum power." Charter of Kauai County § 5.013, *reprinted in* 2 Haw. Rev. Stat. app. at 680 (1976). With certain exceptions not here relevant, all ordinances enacted after January 2, 1977, are subject to the referendum power, *id.* §§ 5.02, .10.

Once a referendum petition is certified, which requires signature of no fewer than twenty percent of the number of eligible registered voters in the last general election, the council must reconsider the ordinance within thirty days and either repeal or sustain the measure, *id.* §§ 5.03C, .07A. "If the council . . . fails to repeal an ordinance reconsidered pursuant to a referendum petition, it shall . . . refer the reconsidered ordinance concerned to the voters of the county at the next general election." *Id.* § 5.07B. The council may, however, provide for a special election, *id.* § 5.07C. A majority vote cast on the referendum issue is required to repeal the subject ordinance, and repeal is effective upon certification of the election results, *id.* § 5.09.

Cognizant of the primary objective of article V, to effect legislation by plebiscite, we now focus on the intended meaning and mitigating affect of section 5.11, applicable to successful referenda. Specifically, section 5.11 of the charter provided as follows at all times relevant to this appeal:

> A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum.

While there is no legislative history to section 5.11, we presume that the section stands for the general proposition that a successful referendum may not, under certain circumstances, operate to repeal an ordinance as it applies to certain persons. As we noted in *Allen* v. *City & County*, 58 Haw. 432, 571 P.2d 328 (1977), a case involving land use, this general principle has

---

[3] The pertinent section of the Kauai County Charter reads as follows:

> Section 5.01. Legislative Power. The legislative power of the county shall be vested in and exercised by the county council, except as otherwise provided by this charter.

been embodied in two similar yet theoretically distinct theories: vested rights and equitable estoppel. This distinction is as follows: "Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by government regulation." *Id.* at 435, 571 P.2d at 329 (quoting Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 65).

In the land use context, the vested rights doctrine was employed synonymously with the estoppel theory by a majority of courts at the time the charter amendment was drafted and adopted. *See, e.g., Anderson* v. *City Council*, 229 Cal. App. 2d 79, 89, 40 Cal. Rptr. 41, 47 (1964); *Meridian Development Co.* v. *Edison Township*, 91 N.J. Super. 310, 220 A.2d 121 (Super. Ct. Law Div. 1966); 3 A. Rathkopf, The Law of Zoning and Planning 57-6 to -7 (1964); Cunningham & Kremer, *Vested Rights, Estoppel and the Land Development Process*, 29 Hastings L.J. 625, 648 (1978); Heeter, *supra*. At that time, the only decision addressing the vested rights issue in this jurisdiction enunciated zoning estoppel principles, *Denning* v. *County of Maui*, 52 Haw. 653, 658-59, 485 P.2d 1048, 1051 (1971). Thus, while we note the constitutionally based aspect of "vested rights" later, we will discuss section 5.11 primarily as an embodiment of equitable estoppel theory.

We reject a literal interpretation of that portion of section 5.11 which provides that a referendum "shall not affect . . . any action taken or expenditure made up to the date of the referendum," for the effect of such a construction would be to grandfather all activities the referendum sought to prevent.[4] "[E]ven in the absence of statutory ambiguity, departure from literal construction is justified when such construction would produce

---

[4] For example, a referendum nullifying an ordinance that had authorized certain classes of business to sell liquor or fireworks could not affect licensed dealers and would be a futile exercise in self-governance. *See* Brown Distrib. Co. v. Oklahoma Alcoholic Beverage Control Bd., 597 P.2d 324 (Okla. 1979) (liquor licenses do not involve vested property rights).

an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." *Pacific Insurance Co.* v. *Oregon Automobile Insurance Co.*, 53 Haw. 208, 211, 490 P.2d 899, 901 (1971). *Cf. In re Sanborn*, 57 Haw. 585, 591-94, 562 P.2d 771, 775-76 (1977) (statutory language regarding land registration not dispositive when in conflict with overriding public policy).

Finally, we note that the "date of the referendum" in section 5.11, prior to which all elements of estoppel must be met for the provision to be applicable, is the date of the vote. Thus, any "action taken or expenditure made" after the vote but before certification of election results is irrelevant for purposes of determining whether the protection of section 5.11 has been invoked.

III.

Having held that the Kauai County Charter protects development rights vested by application of the common law principles of zoning estoppel, we find that the lower court erred in its application of those principles to the undisputed facts of this case. The specific operative facts preclude estoppel to defeat the zoning policy established for the Nukolii site by the electorate in November 1980.

In general, the zoning estoppel theory modifies hornbook law that "permits for buildings and businesses are not per se protected against revocation in effect by subsequent enactment or amendment of zoning laws prohibiting the building, business or use for which they have been issued." 8 E. McQuillan, Municipal Corporations § 25.156, at 459 (3rd ed. rev. 1976) (footnote omitted). Despite a plethora of case law on the subject of zoning estoppel, few courts have applied the theory in the unique context of zoning referenda.[5]

---

[5] *See* Andover Dev. Corp. v. City of New Smyrna Beach, 328 So.2d 231 (Fla. Dist. Ct. App. 1976) (estoppel); Steuart Petroleum Co. v. Board of County Comm'rs, 276 Md. 435, 347 A.2d 854 (1975) (no estoppel); Meridian Dev. Co. v. Edison Township, 91 N.J. Super. 310, 220 A.2d 121 (Super. Ct. Law Div. 1966) (no estoppel). *See also* Brown Distrib. Co. v. Oklahoma Alocholic Beverage Control Bd., 597 P.2d 324 (Okla. 1979).

The only case in which this court held that a county was estopped from enforcing a zoning ordinance was *Life of the Land* v. *City Council*, 61 Haw. 390, 606 P.2d 866 (1980).[6] In considering the estoppel aspect of the case, we applied the following general rule which is permeated by the good-faith requirement of equity:

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

Id. at 453, 606 P.2d at 902. Put another way, "[t]he critical questions become: (1) What reliance is 'good faith'; (2) what sums are 'substantial'; (3) what constitutes 'assurance' by officials; and (4) when does a developer have a right to rely on such assurances?" Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Hawaii L. Rev. 167, 174 (1979). Because the logical analytical progression begins with the last two questions, we shall consider these together first.

A.

The action that constituted official assurance in *Life of the Land* was Honolulu council approval of the developers' application for a variance or exemption to an interim moratorium

---

[6] *Life of the Land* was an appeal from summary judgment in favor of the developers who had obtained a building permit to construct a condominium in downtown Honolulu. The permit was issued after the city council authorized the specific project but before the effective date of a newly enacted zoning ordinance that reduced the maximum height and setback for structures in the affected area. In affirming, this court also held, as a matter of legislative history, that the restrictive ordinance did not apply to the development project.

ordinance on building permits covering the project site. We held that the approval was nonlegislative implementation of an existing ordinance, 61 Haw. at 421-25, 606 P.2d at 886-88. In granting the variance, the council imposed conditions precedent to issuance of the condominium building permit. In short, the variance constituted "final discretionary action" on the specific project.[7]

There was no question that the developers had a right to rely on this official assurance. The county's final discretionary action conformed with the intent, purpose, and spirit of the amendments to the overall zoning scheme, *id.* at 433, 463, 606 P.2d at 892, 907, and with the specific variance procedures designed to implement the objectives of the moratorium ordinance, *id.* 433, 606 P.2d at 892.

Life of the Land therefore teaches that final discretionary action constitutes official assurance for zoning estoppel purposes.[8] This rule acknowledges the incremental nature of the modern development process and strikes the appropriate balance between competing private and public interests. It preserves government control over development until the government's own process for making land use decisions leaves nothing to discretion.[9] A proper understanding of the last discre-

---

[7] 61 Haw. at 446, 606 P.2d at 899. A second council variance approval had amended the first action with retroactive effect to the prior approval date, *id.* at 436, 440-42, 606 P.2d at 893, 896-97, which explains how final discretionary action involved two council votes. Our decision recognized that the council might have reserved its power to give final approval upon compliance review but did not, *id.* at 441, 606 P.2d at 896; the council did reserve its jurisdiction based on contingencies that never materialized and therefore that jurisdiction lapsed.

[8] Our rule marks the midpoint in a wide spectrum of possibilities represented by the decisions of other jurisdictions. *Compare* Spindler Realty Corp. v. Monning, 245 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966) (valid building permit is threshold requirement for establishing vested right), *with* Mercer Enterprises, Inc. v. City of Bremerton, 93 Wash. 2d 624, 611 P.2d 1237 (1980) (rights vest at time of developer's permit application).

[9] Accordingly, in *Life of the Land* we held that the building department's function regarding the condominium building permit was "purely ministerial, to process the application for compliance with all applicable statutes, ordi-

tionary action in a governmental process will lead to predictable results consistent with the important public policy considerations that underlie Hawaii's estoppel rule.

In each case, then, the central focus must be on the existing legal process. Identification of the operative mechanisms also will determine whether analogous governmental actions give rise to a similar right to rely. We now apply these principles to the facts before us.

B.

Since 1976 the county process for advancing development on Kauai potentially involved administrative officials, the county council, and the electorate through the initiative and referendum power. The referendum mechanism is " 'an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest.' " *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668, 678 (1976) (quoting *Southern Alameda Spanish Speaking Organization* v. *Union City*, 424 F.2d 291, 294 (9th Cir. 1970)).

Certification of a petition triggers the referendum mechanism. Until that point, the complicated modern permit system controls development. Zoning estoppel analysis therefore must focus on the status of government approval for any proposed project at the time the referendum mechanism is activated.

If a developer obtains final discretionary action for a project under the permit system while the referendum mechanism remains dormant, then section 5.11 of the Kauai charter and the common law of zoning estoppel will recognize that action as official assurance on which a developer has a right to rely. The law looks to the conduct of the parties in light of the operative

---

nances, rules and regulations, and the conditions attached to the approvals, and to issue the requested building permit after such processing." 61 Haw. at 454, 606 P.2d at 903.

procedures for advancing development. Certification of a referendum does not intervene retroactively into the permit system.

If a developer has not received final discretionary action under the permit system before the referendum mechanism is operative, then the estoppel analysis will recognize that timely intervention of the referendum procedure has made discretionary approval or disapproval of underlying zoning an integral part of the development process as applied to that project. Any administrative or council approvals given after certification and before a referendum vote have no estoppel effect. Where final approval of a project under the permit system occurs in the intervening period, it does not constitute final discretionary action in the development process; in that circumstance, the referendum vote constitutes final discretionary action on which a developer has a right to rely for estoppel purposes.[10] Where intervening administrative or council action leads to issuance of valid permits, a developer may advance the project consistent with those permits but only at the known risk that final discretionary approval will be denied.

In this case it is undisputed that the last discretionary permit action by the County was the April 9, 1980 vote of the planning commission authorizing a Special Management Area (SMA) use permit for the Nukolii development. The SMA permit approval was nonlegislative action imposing new conditions on the development which expressly made compliance therewith precedent to issuance of a building permit. The SMA permit is analogous to the variance granted in *Life of the Land* and would constitute final discretionary action for estoppel purposes[11] but for the fact

---

[10] Where the electorate's power of referendum is the source of council reconsideration of a zoning ordinance, the same analysis would apply to deny estoppel effect to any administrative approvals obtained between certification and council repeal of the ordinance pursuant to a certified referendum.

[11] Appellant correctly notes that the SMA approval was expressly conditioned, *inter alia*, on state health department approval of sewage disposal plans for the project in conformity with the relevant state statute. We do not consider whether final discretionary administrative action under these facts would be health department approval of the sewage treatment plans because we find that even the earlier county SMA approval does not meet zoning estoppel requirements here.

that the zoning referendum already had been certified, thereby enabling the electorate to exercise its discretion regarding the proposed resort. The SMA permit therefore did not advance the Developers' right to proceed other than at their own risk.[12]

The building permits stand in the same shadow cast by certification of the referendum and do not create an irrevocable right to proceed with the Nukolii project. Simply stated, the official assurance upon which the Developers would have a right to rely in this case could come only from the voters, and they chose to withhold it.

Appellees fail to perceive any difference between anticipated legislation in *Life of the Land* and the pending referendum here. They argue that notice of public opposition to the condominium design did not foreclose equitable estoppel there, and no greater effect should be given to public opposition manifested here by the certified referendum.

Our decision in *Life of the Land* emphasized that the primary objective of the moratorium ordinance, to ensure effectiveness of the finalized zoning policy, was not frustrated when the same

---

[12] Although we give collateral estoppel effect to the July 7, 1980 circuit court judgment affirming the planning commission's SMA permit decision and ruling that certification of the referendum did not suspend the zoning ordinance, neither ruling precludes enforcement of the referendum results. The validity of the SMA decision is not at issue here, only its zoning estoppel value. Referendum certification simply made subsequent SMA permit approval a preliminary step in the development process.

Similarly, the no-suspension ruling fails to advance the Developers' claim. Disregarding post-certification approvals for estoppel purposes is not different from disallowing actions taken or expenditures made after the referendum vote but before the election results are certified. *See* discussion in Part II, *supra*. The ordinance remains in effect during both periods and is repealed on certification of election results. Moreover, where final discretionary approval was obtained before the referendum is certified, a no-suspension rule contemplates that ministerial functions will be discharged after referendum certification and while the ordinance remains in effect. Once the ordinance is repealed, section 5.11 of the charter is available to mandate issuance of ministerial permits to a developer who is in compliance with and has made substantial expenditures in reasonable reliance on final discretionary approval received before certification of the referendum. *See* note 9, *supra*.

body that had the sole legislative power in that county to determine the final zoning also retained exclusive power to grant a variance to the moratorium. 61 Haw. at 432-33, 606 P.2d at 891-92. Although public opposition was addressed in the variance process, it could have no direct legal impact on council actions because the electorate's power to disapprove Honolulu council actions is limited to the election process. In contrast, there hardly could be a clearer case in which the primary objective of article V of the Kauai charter would be improperly frustrated by application of zoning estoppel than this one where the referendum to repeal the zoning ordinance authorizing the Nukolii resort was certified before any necessary development permits had been issued.

We hold, as a matter of law, that any approvals or permits for a proposed development issued after certification of a referendum to repeal a zoning ordinance affecting the project site but before termination of the referendum procedure do not constitute official assurance on which the developer has a right to rely. Because the government had not taken final discretionary action authorizing the Developers' project before the referendum was certified, the County is not estopped form enforcing prior zoning that prohibits resort development at Nukolii and resulted from the referendum

The estoppel analysis in this case terminates with certification of the referendum. Therefore, it is irrelevant whether the Developers made substantial expenditures on the Nukolii project before the referendum vote. We will, however, briefly discuss the impact that the pending referendum had on the good-faith element of expenditures because independent consideration of this matter supports our holding that there was no official assurance on which the Developers had a right to rely in making expenditures.

C.

There is no estoppel effect to deny permit revocation where the claimed substantial "expenditures are not made in good faith." 8 E. McQuillan, Municipal Corporations § 25.157, at 462

(3rd rev. ed. 1976) (footnote omitted). In considering whether a developer's expenditures were made in good faith, we employ an objective standard that reflects "reasonableness according to the practices of the development industry." Cunningham & Kremer, *supra*, at 720.

Zoning estoppel is not intended to protect speculative business risks. Thus, an expenditure made in compliance with underlying zoning but before final discretionary action will be disregarded for estoppel purposes. *Life of the Land, supra*, 61 Haw. at 455, 606 P.2d at 903.

Based on the Developers' exhibits, we calculate that they expended $158,797.64 for planning and design of the Nukolii project from the date the resort zoning ordinance was enacted in February 1979 until the referendum was certified.[13] These costs reflect reasonable reliance placed on a preliminary step in the development process[14] and are considerably less than the post-zoning expenditure of $286,345.67 we disregarded in *Life of the Land*. In short, they create no estoppel effect even though they were made in good faith.

When we apply the objective standard of good faith to facts in the record regarding subsequent expenditures, we find that the

---

[13] The aggregate figure is exclusive of $16,533.06 paid to a tourism consultant and $150.00 paid to the County as a permit application fee, neither of which do we deem relevant for estoppel purposes. Based on close scrutiny of the Developers' exhibits of billings and payments, the aggregate total is derived from the following subtotals:

Architectural fees:	31,352.96
Archaeological research:	1,000.00
Planning & Development Consultant fees:	125,456.68
Appraisal fees:	988.00

[14] In addition to the specific zoning ordinance and in reliance thereon, the Developers met with county planning officials in late 1979 to pursue design and other details of the proposed Nukolii project. These private discussions with administrative officials may have given rise to a "good faith expectancy," 61 Haw. at 453, 606 P.2d at 902, that the planning commission eventually would approve the SMA permit application, incorporating the informal agreements reached in these meetings. Again, the reasonableness of expenditures based on these preliminary steps is not questioned, but that does not change the estoppel analysis.

Developers did not reasonably rely on post-certification actions of county officials to insulate the Nukolii project from the impact of a successful referendum. They proceeded at risk that the referendum would pass, as indeed it did.

The bulk of the Developers' expenditures occurred between August 5, 1980, when the condominium building permits were issued, and the date of the referendum.[15] The largest single transaction was the construction loan commitment fee received by Honolulu Federal Savings & Loan Association on September 25, 1980, when the loan agreement for interim and permanent financing of the condominiums was executed. Honolulu Federal expressly reserved its right to terminate the agreement if the referendum passed in the November election. A separate provision of the agreement independently reserved the lender's right of termination for noncompliance with the presale requirement involving the condominium units.[16]

Even before the loan agreement was executed, the Hawaii

---

[15] Our computation is not for the purpose of considering the substantial nature of expenditures and does not account for revocable sums. Based on the Developers' exhibits, our aggregate calculation for the period totals $3,532,897.23, including the $639,720 county "in lieu" fee and facilities reserve charge and the $108,750 earthwork contract completed before the referendum vote, for which there is no record of payment. County permit fees of $44,655.35 were excluded from the figure.

The record also reveals a total of $1,218,325.53 spent by the Developers while the SMA permit decision was under review by the circuit court. These expenditures must be disregarded outright as speculative. *See* 61 Haw. at 414, 454, 606 P.2d at 882, 903; Life of the Land v. City Council, 60 Haw. 446, 450-51, 592 P.2d 26, 29 (1979); Meridian Dev. Co. v. Edison Township, 91 N.J. Super. 310, 316, 220 A.2d 121, 125 (Super. Ct. Law Div. 1966). The fact that the appeal of the circuit court judgment was pending in this court until January 1982 does not change the estoppel analysis. *See* Solarana v. Industrial Elecs., Inc., 50 Haw. 22, 428 P.2d 411 (1967); note 12, *supra*.

[16] The agreement, covering an aggregate loan of $50,500,000, required enforceable sales contracts for 65% of the 150 units by the January 31, 1981 closing date, although Honoulu Federal could extend the compliance date. As of November 3, 1980, there were 60 reservations agreements but only 4 sales contracts (R. 569). Termination based on either presale noncompliance or the referendum results required the lender to refund most of the Developers' $1,320,000 commitment fee and any subsequent loan fees.

Real Estate Commission was warning potential condominium investors about the referendum, based on information provided by the Developers. The commission's August 1980 report on the Nukolii project, which a purchaser must receive before entering a sales contract, contained the following cautionary statements (R. 493):

> PURCHASERS SHOULD BE AWARE HOWEVER THAT THEIR RIGHTS AS PURCHASERS OF UNITS IN THE PROJECT MAY BE AFFECTED BY AND ARE SUBJECT TO THE OUTCOME OF THE REFERENDUM PETITION AND THE RESULTS OF THE NOVEMBER 1980 GENERAL ELECTION WITH RESPECT TO THE ZONING FOR THE PROJECT. THE DEVELOPER HAS SECURED THE NECESSARY BUILDING PERMITS FOR THE PROJECT AND PLANS TO COMMENCE CONSTRUCTION PRIOR TO THE NOVEMBER 1980 GENERAL ELECTION. AS DESCRIBED ABOVE, THE LITIGATION AND APPEAL BY THE SAVE NUKOLII COMMITTEE MAY HAVE AN IMPACT ON THE DEVELOPER'S ABILITY TO COMMENCE AND COMPLETE CONSTRUCTION OF THE PROJECT.

Taken together, the construction loan agreement and the real estate commission report demonstrate that the development industry recognized reliance on county approvals and permits would have been unreasonable under the circumstances. Those documents, both acquiesced in by the Developers, expressly acknowledged the potential importance of the pending referendum upon related business transactions.

Under these circumstances, we are persuaded that the good-faith requirements of zoning estoppel are not demonstrated by the Developers here.[17] The expenditures made toward com-

---

[17] On appeal, the County argues that Appellant did not demonstrate diligence and good faith by challenging the 1979 zoning ordinance when it might have initiated a referendum to repeal the 1977 ordinance that amended the General Plan. Suffice it to say that the record reveals the public first had notice of the proposed Nukolii resort complex when the Developers applied

mencing construction before the referendum vote were not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process.[18]

Finally, we note that even good-faith expenditures will be disregarded if made in reliance on an invalid building permit. *Pettitt* v. *City of Fresno*, 34 Cal. App. 3d 813, 110 Cal. Rptr. 262 (1973), *appeal dismissed for want of substantial federal question*, 419 U.S. 810 (1974); *Ganlev* v. *City of Chicago*, 18 Ill. App. 3d 248, 309 N.E.2d 653 (1974); *Sorenti* v. *Board of Appeals*, 345 Mass. 348, 187 N.E.2d 499 (1963). Here, the condominium building permits were not valid until October 31, 1980, four days before the referendum vote.[19] The Developers' ex-

---

for rezoning; the county charter endowed the voters with referendum power to nullify the council's detailed zoning ordinance; and the County should not now be heard to complain because Appellant vigorously exercised its rights under the charter.

[18] *See* Aries Dev. Co. v. California Coastal Zone Conservation Comm'n, 48 Cal. App. 3d 534, 122 Cal. Rptr. 315 (1975). Consideration of a developer's race to complete a project before adoption of anticipated restrictive legislation usually reflects a subjective test of good faith, complicated by the uncertainty inherent in the normal legislative process. Here, however, the Developers knew the precise date the final zoning decision would be determined by referendum, thereby permitting an objective assessment of reasonableness regarding the scope and costs of expenditures made and obligations incurred within the known timetable.

The Developers deny that their good faith is impugned by having submitted plans for an effluent irrigation sewage system in order to avoid a six-month delay in testing a well injection system. As a practical matter, such delay would have foreclosed issuance of any building permits before the referendum vote. (R. 306, 830-31). The Developers nonetheless candidly admit they never intended to use the originally submitted effluent irrigation system but proposed it on an interim basis to satisfy the County (R. 149, 162, 307-08).

[19] This court is not precluded from deciding the validity of the August issuance of the building permits although that issue had been raised in Appellant's complaint seeking injunctive relief in a separate proceeding, because the circuit court denied relief without reaching the merits. Sorenson v. Raymond, 532 F.2d 496 (5th Cir. 1976); Henderson v. Pence, 50 Haw. 162, 434 P.2d 309 (1967); 18 C. Wright & A. Miller, Federal Practice and Procedure § 4445 (1981).

Ministerial issuance of a building permit requires processing for compliance with conditions attached to prior discretionary approvals, *see* note 9, *supra*.

hibits show a single expenditure during the four-day interval, the $24,907.50 hotel building permit fee.

The foregoing analysis, based on section 5.11 of the Kauai County Charter and the principles of equitable estoppel enunciated in this jurisdiction, compels the conclusion that full effect must be given the November 4, 1980 referendum decision of the electorate repealing the resort zoning ordinance as applied to the Nukolii development. This conclusion is based on a concept of "vested rights", as that term is used in the charter, derived from equity.

IV.

Our holding that the County is not equitably estopped from enforcing the 1980 zoning referendum as applied to the Developers' project is consistent with constitutional concepts underlying the vested rights doctrine. As we noted before, the constitutional analysis rarely produces a different result even though it focuses on "whether the owner acquired real property rights which cannot be taken away by government regulation." *Allen* v. *City & County, supra*, 58 Haw. at 435, 571 P.2d at 329 (quoting Heeter, *supra*, at 65).

In the context of zoning that terminates inchoate rights to develop land, it is well established that such regulation is a legitimate exercise of the police power, *Village of Euclid* v.

Here, the zoning ordinance required compliance with all applicable state and county laws, rules, and regulations prior to construction (R. 30); the subdivision and SMA permit approvals required state health department approval of sewage disposal plans for the development (R.47, 50), and the SMA permit Order prohibited issuance of any building permit until "sewage disposal requirements are resolved with the Department of Health." (R. 47).

Health department approval of the first proposed sewage disposal site violated H.R.S. § 205A-29(b) (Supp. 1981), because the site did not have the required SMA permit (R. 71, 143, 148). As a result, the health department intended to revoke its approval, but the Developers subsequently proposed a new plan with a different disposal site obviating the SMA permit problem, and those plans received state approval on October 31, 1980 (R. 463).

Ambler Realty Co., 272 U.S. 365 (1926), and that zoning by referendum is compatible with due process, *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). The Supreme Court has nonetheless recognized that rezoning may rise to the level of a constitutional deprivation of property rights where "the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted).[20] No precise rule has been established for determining when a "taking" has occurred through rezoning, but it is clear that the constitutionally permissible balance between public and private interests allows diminution in value of the owner's land absent a total prohibition on development. *Id.* at 260-62. *See Burrows* v. *City of Keene*, 121 N.H. 590, 432 A.2d 15 (1981) (inverse condemnation by rezoning property from rural to conservation thereby limiting use to open space).

The 1980 zoning referendum satisfied constitutional requirements as applied to the Nukolii development.[21] First, the rational basis for preserving agricultural zoning of the 25-acre parcel is underscored by compatibility with the county zoning of bordering acreage, which prohibits resort development. Second, the Developers purchased the land in 1974 when it was zoned agriculture and open space, and their rights to use and develop the parcel consistent with that zoning remain unchanged as a result of the referendum.

---

[20] *Accord*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). *See also* Allen v. City & County, *supra* (government may invoke power of eminent domain to enforce rezoning where zoning estoppel otherwise precludes enforcement).

[21] In contrast, the constitutionality of the resort zoning ordinance itself may be suspect because of the "in lieu" payment required under the ordinance as a "fee for recreational facilities and outright contribution for its first phase" of authorized development. (R. 28). We do not consider whether the payment was reasonably related to the county needs that would arise as a result of the development because repeal of the ordinance makes the issue moot. *But cf.* J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981). (blanket dedication requirement unconstitutional when applied without individual consideration for project seeking approval).

When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right. *See* Cunningham & Kremer, *supra*, at 662-64, 718. Thus, the Developers may not establish "a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 130 (1978). The particular circumstances of each case will determine whether "regulation has interfered with distinct investment-backed expectations" sufficient to require compensation therefor. *Id.* at 124. *See Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979).

Our prior estoppel analysis resolves these constitutional considerations against the Developers. Before certification of the referendum, they had only a reasonable belief that the Nukolii site could be developed in accordance with the resort zoning. After certification, the most basic requirement for development—zoning compliance—became speculative. Subsequent tokens of governmental assurance were tarnished and could not give rise to reasonable expectations upon which to base investments. The record further supports the speculative nature of the Developers' expenditures: The referendum was discussed three times in the SMA permit decision of the County; it was a pivotal provision in the loan agreement covering the proposed condominium construction; and potential investors were warned that their rights under a sales contract were subject to the referendum results. Together, the Developers' expenditures and site preparation work constituted business risks rather than a basis for constitutional claims.

Other jurisdictions have developed a harsh rule denying either estoppel or vested rights effect absent substantial construction in reliance on a valid building permit. *See, e.g., Avco Community Developers* v. *South Coast Regional Commission*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1083 (1977) (statutory man-

date); *Spindler Realty Corp.* v. *Monning*, 245 Cal. App. 2d 255, 53 Cal. Rptr. 7, *cert. denied*, 385 U.S. 975 (1966) (valid building permit is threshold requirement for establishing vested right); *Steuart Petroleum* v. *Board of County Commissioners*, 276 Md. 435, 443-44, 347 A.2d 854, 860 (1975); *Brett* v. *Building Commissioner*, 250 Mass. 73, 145 N.E. 269 (1924) (sustaining revocation of building permit after landowner entered into construction contracts and completed excavation for foundation). We are persuaded that the application of our rule in this case has no more harsh effect and comports with the flexible formula "for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government" under the fifth and fourteenth amendments. *Penn Central Transportation Co.* v. *New York City*, *supra*, at 124.

Because the referendum was certified before any post-zoning approvals were obtained, preliminary or otherwise, enforcement of the 1980 referendum, which returned the permitted land use for the Nukolii site to the prepurchase zoning, does not offend principles of equity or constitutional guarantees. Since they acquired no irrevocable rights to construct the resort complex by virtue of the intervening events, the Developers have no constitutional claim that a taking has occurred.

V.

Reversed and remanded with instructions to enter summary judgment for Appellant and to order revocation of the condominium and hotel building permits, to restrain any further construction on the Nukolii site, to mandate refund by the County of the "in lieu" fee paid by the Developers pursuant to the resort zoning ordinance, and to hear requests for such other relief as the court deems proper.[22]

---

[22] No argument or evidence has been presented respecting the remedy of a mandatory injunction compelling the removal of any completed improvements on the Nukolii site. We are therefore unprepared to provide specific instruction regarding the issuance of such an injunction. However, as the issue is

S/William L. Richardson
Herman F. Lum
Ronald B. Grieg
Thomas S. Ogata
Benjamin Menor

[Filed: Oct. 14, 1982]

Sidney M. Wolinsky (Karen M. Holt and Lawrence D. McCreery on the briefs) for Respondent-Appellant.

Walton D. Y. Hong (Masuoka & Hong of counsel) for Respondents-Apellees.

Michael J. Belles, Deputy County Attorney, County of Kauai, for Petitioner-Appellee and Third-Party Defendant-Appellee.

---

likely to arise on remand and this court has yet to pass on the issuance of such injunctions for zoning violations, we feel that a brief discussion of the matter is appropriate to provide further guidance to the trial court.

Mandatory injunctions are, of course, permitted as an appropriate remedy for zoning violations. Jurisdictions differ however in their willingness to grant such injunctions. At one extreme it is presumed that such an injunction is the appropriate remedy and it is the defendant's burden to prove that such enforcement would not be of benefit to the health, safety and welfare of the public. City of Chicago v. Handler, 288 N.E.2d 714 (Ill. App. 1972). Conversely, it has been held that such an injunction should normally issue "only in cases of necessity where serious injury is being inflicted or will be inflicted." City of Dallas v. Gaechtner, 524 S.W.2d 400, 402 (Tex. Civ. App. 1975).

We conclude that where, as in this case, a defendant does not intentionally violate underlying zoning, the latter rule should serve as the standard governing the issuance of a mandatory injunction for the removal of a completed improvement. For, absent conscious wrongdoing, we believe that the severity of the remedy should be reserved for circumstances where the waste engendered by the destruction of a completed improvement is clearly justified by preservation of the interests protected by the zoning involved. *See e.g.* Zelios v. City of Dallas, 568 S.W.2d 173 (Tex. Civ. App. 1978) (mandatory injunctive relief is proper when defendant acts with full knowledge that his acts are wrongful).

This is not to say the complainants are without recourse in the absence of a demonstration of "serious injury". Alternative remedies available to them include damages or the fashioning of other injunctive relief which would mitigate any harm caused by the offending structure.

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

COUNTY OF KAUAI,

Petitioner,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY, GRAHAM, BEACH PARTNERS and COMMITTEE TO SAVE NUKOLII,

Respondents,

vs.

EDUARDO E. MALAPIT, individually and in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Third-Party Defendant.

CIVIL NO. 2388

DECISION, ORDER AND JUDGMENT

The Motion for Summary Judgment, filed by Respondents Pacific Standard Life Insurance Company and Graham Beach Partners, and the Motion for Partial Summary Judgment, filed by Respondent Committee to Save Nukolii, came on for hearing on January 30, 1981. Walton D. Y. Hong, counsel for Respondents Pacific Standard Life Insurance Company and Graham Beach Partners, Michael J. Belles, counsel for Petitioner County of Kauai and Third-Party Defendant Eduardo E. Malapit, and Max W. J. Graham, Jr., Stephen A. Levine, Lawrence D. McCreery and Karen Holt, counsels for Respondent Committee to Save Nukolii, appeared and presented their respective arguments.

The Court, having considered all of the records and files and the memoranda and arguments of counsels herein, hereby holds

that there are no genuine issues of material facts. The Respondent Committee to Save Nukolii has relied on mere allegations and denials in its pleadings and arguments and has failed to present opposing affidavits which raise issues of material facts as required by Rule 56(e) of the Hawaii Rules of Civil Procedure. The various agencies of the County of Kauai did properly and legally issue the various permits to the Respondents Pacific Standard Life Insurance Company and Graham Beach Partners. The certification of the legal sufficiency of the referendum petition by the County Clerk on January 30, 1980, as provided in the Kauai County Charter, did not suspend the referred ordinance upon such certification.

The Court further holds that Respondents Pacific Standard Life Insurance Company and Graham Beach Partners, having incurred substantial expenditures in reliance upon the existing zoning, did acquire vested rights to continue and complete the condominium and hotel project at Nukolii. This conclusion is based upon Section 3.01 of the Initiative and Referendum Article of the Kauai County Charter, as amended, which provides that: "A referendum that nullifies an existing ordinance shall not affect vested rights or any action taken or expenditures made up to the date of the referendum." The vesting occurred prior to the issuance of the condominium building permits on August 5, 1980, and prior to the date of the referendum which the Court deems to be November 4, 1980.

The Court also holds that the County of Kauai is equitably estopped from prohibiting the continuation and completion of the Nukolii project. This holding is based on *Denning v. County of Maui*, 52 Haw. 653, *Allen v. City & County of Honolulu*, 58 Haw. 432, *Life of the Land v. City Council*, 60 Haw. 446, and *Life of the Land v. City Council*, 61 Haw. 390.

All of the remaining issues raised by Respondent Committee to Save Nukolii in its Counterclaims and Crossclaims are without merit for the reasons stated in the memoranda filed by Respondents Pacific Standard Life Insurance Company and Graham Beach Partners and Petitioner County of Kauai in support of the Motion for Summary Judgment.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion for Summary Judgment filed by Respondents Pacific Standard Life Insurance Company and Graham Beach Partners is hereby granted;

2. The Motion for Partial Summary Judgment filed by Respondent Committee to Save Nukolii is hereby denied;

3. Judgment in favor of Petitioner County of Kauai and Respondents Pacific Standard Life Insurance Company and Graham Beach Partners and against Respondent Committee to Save Nukolii is hereby rendered in accordance with the foregoing; and

4. Judgment shall be entered in accordance herewith.

DATED: Lihue, Hawaii, Feb. 9, 1981

s/ Kei Hirano

Judge of the Above-Entitled Court

[Filed: Feb. 9, 1981]

MORRIS S. SHINSATO 885-0
County Attorney
MICHAEL J. BELLES 1577-0
Deputy County Attorney
County of Kauai
State of Hawaii
4396 Rice Street
Lihue, Hawaii 96766
Tel. No. 245-3688

Attorneys for Petitioner
and Defendant

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

COUNTY OF KAUAI,

Petitioner,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY, GRAHAM BEACH PARTNERS AND COMMITTEE TO SAVE NUKOLII,

Respondents,

vs.

EDUARDO E. MALAPIT, individually and in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Third Party Defendant.

CIVIL NO. 2388

STIPULATION TO AMEND DECISION, ORDER AND JUDGMENT

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective counsel, that the Decision, Order And Judgment dated and filed herein on February 9,

1981 is hereby amended by revising, in its entirety, the second full paragraph contained on page -3- of such decision to read as follows:

"All of the remaining issues raised by Respondent Committee to Save Nukolii in its Counterclaims, Cross-claims and Third Party Complaint are without merit for the reasons stated in the memoranda filed by Respondents Pacific Standard Life Insurance Company and Graham Beach Partners and Petitioner County of Kauai in support of the Motion for Summary Judgment."

DATED: Lihue, Kauai, Hawaii, this 10th day of February, 1981.

s/Max W. J. Graham, Jr.
MAX W. J. GRAHAM, JR.
Attorney for Committee To Save Nukolii

s/Walton D. Y. Hong
WALTON D. Y. HONG
Attorney for Pacific Standard Life Insurance Company and Graham Beach Partners

s/Michael J. Belles
MICHAEL J. BELLES
Attorney for Petitioner and Defendant

APPROVED AND SO ORDERED:

[seal] s/Kei Hirano
JUDGE OF THE ABOVE-ENTITLED COURT

[Filed: Feb. 11, 1981]

APPENDIX C

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

In the Matter of the Application

of

PACIFIC STANDARD LIFE INSURANCE COMPANY AND JOHN GRAHAM COMPANY (CLASS IV ZONING PERMIT Z-IV-80-26 and SPECIAL MANAGEMENT AREA USE PERMIT SMA (U)-80-11).

Civil No. 2260.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, TO DISMISS

The Motion for Summary Judgment, or in the Alternative, to Dismiss, filed herein by the Appellees Pacific Standard Life Insurance Company, John Graham, Planning Commission of the County of Kauai and the Planning Department of the County of Kauai, having come on for hearing on June 20, 1980; and

Appellants William K. Asing and Petitioners Committee To Save Nukolii, represented by their counsel Max W. J. Graham, Jr.; Appellees Pacific Standard Life Insurance Company and John Graham, represented by their counsel Walton D. Y. Hong; and Appellees Planning Commission and Planning Department of the County of Kauai, represented by their counsel Michael J. Belles, all having presented arguments and memoranda in support of their respective positions; and

The Court, having duly considered the pleadings and record on appeal, oral arguments of counsels for all parties, and the files and records herein, and being fully advised in the premises,

makes the following findings, conclusions and decison and order:

1. This Court, in view of the whole record, is left with the conviction that neither a mistake has been made, nor that the decision of the Appellee Planning Commission of the County of Kauai was erroneous based upon the reliable, probative and substantial evidence contained within the said record;

2. The Initiative and Referendum Article of the Kauai County Charter contains no provision that suspends the effect or operation of an ordinance when a referendum petition is filed and certified as sufficient seeking to repeal such ordinance. Based on the absence of such a provision and upon the legal authorities cited by the Appellees, the filing of that certain referendum petition by the Appellants Petitioners Committee To Save Nukolii, certified by the County Clerk of the County of Kauai on Janury 30, 1980, did not suspend the effect or operation of Ordinance No. PM-26-79;

3. No genuine issues as to any material facts exist, and the Appellees are entitled to judgment as a matter of law and to dismissal of this action for the above-stated reasons.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

A. The decision of the Appellee Planning Commission of the County of Kauai herein at issue is affirmed;

B. The Appeal herein is dismissed; and

C. Judgment in favor of the Appellees and against the Appellants is entered in accordance herewith, pursuant to Rule 72(k) of the Hawaii Rules of Civil Procedure.

DATED: Lihue, Kauai, Hawaii, July 7, 1980

S/ Kei Hirano

Judge of the Above-Entitled Court

[Filed: July 7, 1980]

APPENDIX D

MASUOKA & HONG
Of Counsel

WALTON D. Y. HONG 890-0
P. O. Box 1727
Lihue, Hi 96766
Tel. 245-4757
Attorney for Defendant Pacific
Standard Life Insurance Co.

IN THE CIRCUIT COURT OF THE FIFTH CIRCUIT
STATE OF HAWAII

COMMITTEE to SAVE NUKOLII, et al.,
Plaintiffs,

vs.

BRIAN NISHIMOTO, in his capacity as DIRECTOR of the PLANNING DEPARTMENT OF THE COUNTY OF KAUAI, et al.,
Defendants.

CIVIL NO. 2321

ORDER DENYING TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

The hearing on the Plaintiffs' above-named Motion for Temporary Restraining Order and Preliminary Injunction having come on for hearing on the 2nd day of September, 1980, the

Plaintiffs being represented by their counsel Stephen A. Levine; Defendants Brian Nishimoto, Planning Commission of the County of Kauai, County of Kauai, and Building Division of the Department of Public Works of the County of Kauai being represented by their counsel Michael J. Belles; and Defendant Pacific Standard Life Insurance Company being represented by its counsel Walton D. Y. Hong, and

The parties present, through their respective counsel having presented arguments, and the Court, having considered the arguments presented, the Memorandum in Opposition to Motions for Temporary Restraining Order and Preliminary Injunction, and the files and records herein, and being fully apprised in the premises,

The Court, on the basis of the foregoing, hereby finds that:

(a) The Plaintiffs' motion for temporary restraining order and preliminary injunction is premature, in that the Plaintiffs have failed to exhaust all administrative remedies;

(b) The Plaintiffs have failed to establish immediate and irreparable harm or injury.

ACCORDINGLY, the Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction is hereby denied.

DATED: Lihue, Hawaii, Sept. 5, 1980

[seal] S/ Kei Hirano
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

S/ Stephen Levine
Stephen A. Lavine
Attorney for Plaintiffs

S/ Michael J. Belles

Michael J. Belles
Deputy County Attorney
County of Kauai
Attorney for Defendants Brian Nishimoto, Planning Commission of the County of Kauai, County of Kauai, Building Division of the Department of Public Works of the County of Kauai

[Filed: Sept. 5, 1980]

APPENDIX E

THE PLANNING COMMISSION OF THE
COUNTY OF KAUAI
STATE OF HAWAII

IN THE MATTER OF THE APPLICATION
OF
PACIFIC STANDARD LIFE INSURANCE COMPANY AND
JOHN GRAHAM COMPANY
FOR
CLASS IV ZONING PERMIT Z-IV-80-26; SPECIAL
MANAGEMENT AREA USE PERMIT SMA(U)-80-11

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

The above entitled application came on for hearing before the Planning Commission of the County of Kauai, State of Hawaii, at 3:26 p.m. on the 23rd day of January, 1980, at which hearing the applicant's agent and witnesses appeared. The Planning Commission further granted intervention status to the Save Nukolii Committee and Mr. Kaipo Asing at the hearing, at which time the Commission heard testimonies and considered all the evidence submitted. The Commission deferred action until the March 28, 1980 meeting. Such action was further deferred to the April 9, 1980 meeting, at which time additional testimonies were presented by the applicant and the intervening parties. The Commission makes the following Findings of Fact, Conclusions of Law, Decision and Order.

FINDINGS OF FACT

1. The property is located at Hanamaulu, Kauai, south of the former County baseyard site, more commonly known as the "Nukolii Dairy" site, is further identified as Tax Map Key: 3-7-03:7, containing an overall area of 25 acres.

2. The property is within the Urban Land Use District, with an approximately 150 feet wide strip of land along the shoreline being in the Conservation District. The General Plan designation for the property is "Resort" with the Conservation strip being "Open." On February 2, 1979, the County Council approved Ordinance No. PM-26-79, granting "Resort District (RR-20)" zoning for the property. The Conservation strip remained in the "Open District (O)."

3. The applicant is seeking an SMA Use permit and Class IV Zoning permit to construct a 150-unit condominium project and a 350-room hotel with support services, which is the maximum densities allowed on the site as per Ordinance No. PM-26-79.

4. The design criteria outlined in "Exhibit A" of Ordinance No. PM-26-79 are being complied with.

5. A portion of the site lies within the tsunami zone as established by the Flood Insurance Administration Flood Hazard Map. Plans indicate that all habitable floor areas will be constructed above the 100-year tsunami level.

6. Relative to sewage, a sewage treatment plant of 150,000 gallons per day capacity on a one-acre site on the mauka Wailua corner of the property will be constructed by the applicant. The sewage treatment plant will be operated and maintained without cost to the County. The plant will meet all State and County requirements.

7. Relative to drainage, surface water runoff will be handled on the project site by directing runoff into the lagoons. In the event that the lagoons are unable to accommodate the runoff in times of unusual inclement weather, a standby injection well system is designed for the disposal of excess runoff into the ground.

8. Agency review comments from the Public Works Department, Water Department, Fire Department, State Health Department, State Highways Division, and the Police Department are incorporated herein by reference, and can be found in the Class IV Zoning Permit file Z-IV-80-26 and

SMA Use Permit file (U)-80-11, located in the Kauai Planning Department.

9. The applicants and their witnesses provided testimony primarily related to environmental impacts. The applicant further testified that the proposed project is in compliance with all conditions of Zoning Amendment Approval (Ord. No. PM-26-79), adheres to design guidelines established at the time, and that they fully subscribe to payment of the $500,000 development assessment fee. Further representations made by the applicant were the provision of public access, the utilization of Kauai labor and contractors, and the employment of local residents.

10. *ISSUES RAISED BY INTERVENORS.* The Save Nukolii Committee, through their attorney, provided witnesses that raised many issues relative to the impacts that would be generated by this project. Concerns were raised questioning whether this project is consistent with the following sections of the SMA Rules & Regulations:
    A. Sec. 1.2 Purpose
    B. Sec. 3.0 Objectives and Policies
    C. Sec. 4.0 Special Management Area Guidelines

    Other concerns raised by the Save Nukolii Committee intervenors are as follows:

    A. *Traffic* — the proposed project will increase traffic on Kuhio Highway thereby adding to the existing congestion that already exists during peak hours; that additional traffic hazards will be due to the increase in traffic, a new intersection on Kuhio Highway at the project entry, and the construction of a 12" waterline from Wailua to the site; and that such hazards may cause more traffic accidents resulting in more traffic-related deaths.

    B. *Crime* — relating to a report entitled "Tourism and Crime," prepared by the University of Hawaii's School of Travel Industry Management and the Social Science Research Institute, the intervenors cite that there is a

direct correlation between tourism and crime, and that an increase in tourism results in a proportionate increase in crime.

C. *Recreation Opportunities* — the proposed project will curtail the range of existing and potential recreation uses of the site; that the proposed recreation uses proposed by the project include tennis, swimming pool, etc., and are not coastal dependent. The project would adversely effect some of the existing recreation activities occurring on the site that are coastal-dependent (i.e., net-fishing, shore-casting, diving, etc.).

D. *Historic Survey* — the intervenors claimed that the historic survey made was inadequate due to the minimal effort of the work performed.

E. *Public Costs* — A variety of impacts will be generated by this project that will affect public service cost. Increased demands will be placed on the public Wailua Golf Course and surrounding parks and recreation facilities; additional medical and rescue services and police protection will be needed. The increase in traffic onto Kuhio Highway generated by this project will hasten the need to construct the Hanamaulu-Ahukini Bypass road, further impacting on public funds. Increased traffic will incur higher road maintenance costs.

The intervenors further claim that additional demands will be placed on government to provide more subsidized housing to accommodate the additional people to the area who would be employed by the proposed project. This assumption was deduced from the fact that most hotel employees fall in the lower end of the pay scale, and based on their wages alone, it would be difficult for them to purchase their own home on the open market at today's prices. Furthermore, additional construction jobs will require migrant employees which will create further demands on the existing housing supply, which is already limited. Reference was further made to the Draft State Housing Plan, stating that

Kauai had "excessive zoning" since population figures derived from the existing and proposed projects exceeded those population projections made by the State (Series II F).

Relative to the potential tax revenues generated by this project, the intervenors claim that the public service costs involved may exceed the benefits, and relative to the cost/benefit ratio, the County may only break even at best.

F. *Energy* — the intervenors' claim that the environmental impact assessment does not cover energy usage or the impact of this project to energy production and cost on Kauai, especially since tourism incurs intensive energy usage. Higher energy costs lead to higher air fares, which may induce the following:

1. Less tourists
2. Lower occupancy rates
3. Less employment

G. *Other Impacts* — the intervenors' claim that the approval of this project will foreclose management and planning options and will affect the shoreline resources now existing at the site. Furthermore, the proposal violates a General Plan policy that resort projects should be in developed areas, and the SMA process should be used to re-evaluate the General Plan and test the established land uses to see if planning options are reserved.

The intervenors suggest that the County look for alternative employment bases other than tourism, that have less environmental impacts.

Most importantly, the intervenors' request that action on this proposed project be deferred until the results of the referendum vote are known.

11. *APPLICANT'S REBUTTAL.* The applicant, through their attorney submitted a letter of rebuttal dated February 11, 1980. The letter provided information on traffic-related

deaths, which the intervenors' claim will increase should this project be approved. The letter stated that none of the deaths in 1979 involved collisions of vehicles at intersections nor were any of them caused by tourists. The letter concludes that there is no correlation between traffic-related deaths and the development of resort facilities on the island of Kauai.

Relative to concerns expressed of the impact on traffic that will be caused by this development, the applicant admits that the proposed hotel and condominium project will generate additional traffic on Kuhio Highway, approximately 11% of the total traffic within that vicinity of Kuhio Highway. The applicant contends, however, that visitors do not have the same traveling habits as that of the general populace, and that tourists do not utilize the roadways during peak hours.

Relative to energy concerns, the applicant disagrees with the intervenors that hotels are the greatest users of electrical energy and that permitting hotel construction will cause the costs of electricity to the public to increase for the following reasons:

A. A single-family residence uses more electrical energy per capita than a hotel complex per tourist;

B. the largest users of electrical energy are light industrial and certain types of commercial establishments;

C. single-family residences account for the greatest peak usage requirements. Hotel usage of electricity is more distributed over the day and require less peak demands.

The applicant further disagrees with the intervenors' contention that costs to government will exceed the benefits derived from this project; that the intervenors did not relate to other revenues incurred in addition to real property taxes, such as excise taxes and personal income.

The applicant does not dispute that increased tourism will

result in increased crime, however, they contend that the rate of crime has been rising nationwide and is not restricted to visitor destination areas; that its cause is more a result in the breakdown of the moral fabric of our society rather than coincidental with the increased development of an area.

Relative to concerns raised to development within the tsunami zone, the applicant will comply with all of the requirements for construction within a tsunami zone to assure the safety of future visitors and occupants of the property.

In his closing arguments and conclusion, the applicant states that the proposed development complies with the objectives, policies and guidelines of the Special Management Area Rules and Regulations.

12. *REFERENDUM*. The Save Nukolii Committee has successfully secured the 4,000 signatures required to place a previous action up for a referendum vote at the November, 1980 election. The signatures were confirmed by the County Clerk on January 30, 1980. The intent of the referendum drive is to *reverse* a previous decision which approved a zone change for the subject property from Agriculture District (A) to Resort District (RR-20). The County Attorney has determined that the referendum petition cannot prevent the Planning Commission from taking action on the application on the basis that there is no suspension period mentioned in the County Charter, for an ordinance which is the subject of a referenda. Therefore, in the absence of expressed legislative authority, action cannot be suspended, and the affected ordinance is still valid between the period the referendum petition is approved and the day it is voted upon.

13. Relative to the SMA Permit, some of the concerns raised by the intervenors should be considered under the SMA review process, and some are not directly related. Many of the concerns raised are not primarily caused by this project and extend beyond its boundaries. Concerns such as traffic, crime, and energy involve other factors besides this project,

that contribute to the impacts generated. All of the concerns raised are addressed in its proper perspective relative to this project.

14. *TRAFFIC* — A project of this magnitude will contribute to additional traffic onto Kuhio Highway. The Environmental Assessment points out an additional 400 vehicles per hour during the peak hour traffic will occur as a result of this project. Traffic counts extracted from the assessment for this portion of Kuhio Highway indicate approximately 15,000 to 18,000 vehicles per day, and peak volumes of 1200 to 1400 vehicles per hour. The peak volumes would increase to 1600 to 1800 vehicles per hour as a result of this project. The 1968 Highway Capacity Manual indicates the maximum capacity for a two-lane rural highway is 2000 vehicles per hours. Based on the 1975 Highway Capacity Manual, the capacity for Kuhio Highway is estimated at 1800 to 1850 vehicles per hour. On this basis, it appears that this project will bring the traffic volume on Kuhio Highway near to capacity or up to it during the peak hours. The assessment states that capacity in the Kapaa direction will be reached in the late 1980's or possibly before then and that at least a four(4)-lane highway will be necessary to Kapaa with possible channelization at major intersections.

    The Hanamaulu-Ahukini Bypass road upon its completion should accommodate the anticipated increase in traffic in the Lihue direction only. However, since the by-pass road will not extend to this site, that portion of Kuhio Highway fronting the project will still be subjected to increased traffic and the resultant increase in potential hazards.

    A 1977 survey, performed by A. M. Voorhees & Associates stated that during the peak hours between 4:00 p.m. and 5:00 p.m., approximately 22% of the vehicles on Kuhio Highway north of Lihue were operated by tourists. These figures indicate that additional tourist-oriented developments will contribute to greater traffic volumes onto Kuhio Highway. The claim of the intervenors' that increased tourism results in a proportionate increase in traffic accidents or

fatalities, cannot be disputed. However, it is only a partial cause of the potential increases, and this project cannot be wholly attributed as being the primary factor. There exists other developments that contribute to increased traffic, such as residential subdivisions in the Kapaa-Wailua area, commercial developments in Lihue, and resort developments in other areas.

In evaluating the impacts to Kuhio Highway at this location, all of these developments should be reviewed cumulatively, and because it is a major corridor, its evaluation should be considered from a regional context. The increased traffic, however, will generate some adverse effects, which include more congestion, a new major intersection and a greater potential for a proportionate increase in traffic accidents.

15. *CRIME* — The intervenors further claim that a proportionate increase in crime will result from increased tourism development, and like traffic, this point cannot be disputed. Similarly, however, this project cannot be isolated to be the major contributor to the potential increase in crime, since all developments contribute to this problem. By the law of averages, the rise in crime is a natural progression commensurate with population growth resulting from increased developments.

The development of a resort complex may generate more opportunities for crimes to occur, but similarly, such opportunities can also be created in the approval of a shopping center, an industrial area, or a large residential subdivision. Land Use management is a tool to guide the overall growth and development of an area and should not function as a means to deter or reduce the crime rate. Crime deterrence is a function of our justice system, the laws we abide by, and the methods of enforcing such laws. Understandably, should this project be approved, there may be and [sic] increase in tourist-related crimes; however, to reduce crime by regulating land uses is an indirect solution to the problem. If opportunities for crime are not allowed here, it may occur elsewhere due to the approval of other types of de-

velopments or the expansion of existing visitor destination areas at other locations on Kauai.

Should this development be denied on the basis that it will contribute to increased crime, then this rationale should also be a factor when evaluating other developments elsewhere.

16. *ENERGY* — Additional energy consumption resulting from this project will require the generation of more electricity. We have not been able to determine if the increase in energy consumption and production will mean an increase in electricity costs. We do know, however, that increased energy production requires the burning of more fossil or fibre fuels and in this sense we concur with the intervenors that the project will increase energy costs. Relative to impact on Kauai, energy consumption will increase; however, to verify if energy costs to the *consumer* will increase proportionately, a check was made with the Kauai Electric Company. Because there exists more than adequate generation capacity, no new funds are required for additional generators at KE. Because their facilities are close to the area, revenues from this project will not exceed the costs to KE to service this project. Therefore, costs to the consumer should be stable and should not increase.

17. *HOUSING IMPACT* — Points raised relative to housing are two-fold, in that during the construction period, it is most likely that migrant off-island workers will be brought in and will absorb the limited number of rental housing now available. These workers would be competing with residents for housing and most likely can afford to pay higher rents. Secondly, the hotel will create a new employment base, and the wages for hotel workers other than managers are on the lower end of the pay scale. The impact referred to here is that these employees will have difficulty purchasing their own homes based on these wages, and that the burden of providing low-cost affordable housing will rest on government.

These problems were recognized at the time of zoning

amendment approval, and the idea of requiring the developer to provide employee housing was discussed. The outcome, however, was that the applicant must contribute a $500,000 fee for recreational facilities instead. The Council, however, amended the language of the condition such that this fee could be used for housing or other purposes by the County.

If hotel employee wages alone are considered, then they would fall in the lower end of the pay scale. However, most hotel employees receive tip income which is equivalent to or greater than their wages. Bellhops, waiters, and waitresses fall into this category, and many of them earn over $20,000 per year. Those who do not receive tip income, such as desk clerks, hostesses, chambermaids, etc., may fall in the lower wage bracket. Although most hotel jobs may not be prestigious, some do pay well. The problem of providing subsidized housing for employees is of a lesser magnitude than presented, since only a percentage of hotel workers may need assistance. Furthermore, many of the hotel workers will already have housing.

In reviewing approximately 300 applications for two of the County of Kauai's housing projects, (Kekaha and Kawaihau) it was found that 10% of those who applied were hotel employees, earning an average of $8650 annually. To qualify for Federal subsidized housing, (Federal Housing Administration or Farmer's Home Administration) the maximum earnings per household cannot exceed $19,000 to $20,000. Under the Hula Mae Program, the maximum earnings are higher; for a 4-member family, it is $25,486; for an 8-member family it is $30,846.

Under the Hula Mae Program, it appears that many hotel employees would qualify for subsidized housing and would apply probably at a ratio similar to the above percentage.

Relative to housing then, it appears that government will play a minor role in providing housing for some of the hotel employees.

18. *OTHER CONCERNS*. Several other factors were raised by the intervenors of which the impacts cannot be wholly attributed to this project. Concerns such as the requirements for more medical services, more rescue operations and more road maintenance involve more than just this project and is a direct result of total development and growth of the whole island in general. The claim that the public service costs may exceed the benefits derived from this project deserves discussion. If only the direct impacts generated from this project are considered, such as more police and fire protection, more parks and road maintenance, etc., then the tax revenues collected, both real property and excise, would probably off-set these costs. If public service costs include the construction of a 4-lane highway to Kapaa or the Ahukini-Hanamaulu Bypass road, then definitely the revenues generated from this project will not cover these costs. This project, however, cannot be isolated to be the one that must generate enough tax revenues to the County or State to offset these costs, since the Kuhio Highway traffic problem is more regional in nature and involves many other factors as well, such as other resort destination areas, the airport expansion, new shopping center or industrial developments, etc.

Another point raised was that Kauai County has "excessive zoning" to accommodate developments, citing a report in the State Housing Plan which relates to growth in the Poipu area. The report states that the level of growth projected for 1985 (Series II-F Projections, DPED) has already been surpassed in Poipu by 3,800 people, in light of recent project approvals. The intervenors' contention is that because growth has occurred rapidly at other resort destination areas, it is not needed at Nukolii. When economic conditions encourage growth to occur faster than what it's planned for, lands zoned for develoment become utilized within a shorter time-frame. Excessive zoning is not the primary cause to rapid growth since such lands at Poipu were zoned that way since 1972. Economic conditions are, and fortunately such conditions do change. Periods of rampant growth are nor-

mally followed by periods of stabilization or regression. Therefore, over time an average rate of growth can still be maintained. Relative to this project, however, zoning is not the issue since the subject site is already zoned for resort development.

Other concerns that alternative employment opportunities other than tourism should be pursued by the County, and the attitude that tourists do not want to see over-development on Kauai, are valid to consider, but these do involve other disciplines and further relate to County-wide goals and objectives. The promotion of tourism development is also another valid objective of this County which must also be considered here. Planning and implementation of these goals and objectives should be balanced, and one should not be in conflict with the other.

19. *SMA REQUIREMENTS*. Relative to Special Management Area, the project will be providing access to the shoreline along with a public parking area; no development is proposed within the 150-feet Conservation Strip along the shoreline fronting the project; Development within the 100-feet "transition zone" which runs inland from the mauka Conservation boundary will be limited. The three-story buildings within the transition zone are set back a minimum of 60 feet from the Conservation line, therefore, the total minimum building setback will approximate 210 feet from the vegetation line. Coastal dependent recreation opportunities such as diving, fishing, and surfing can still be maintained due to this wide setback.

Because the site has been mass-graded with most of the sand removed and replaced with dirt fill, it is questionable if any historic or archaeological resources is present on the site.

There exists no known endangered flora or fauna on the site, nor is there any known wildlife habitats or estuaries present. Impacts from drainage into adjacent ditches are considered minimal, since these ditches must presently drain a 720-acre drainage basin located mauka of this site.

To assure that this project will be designed in harmony with the existing character of the area, a set of design guidelines was prepared at time of zoning approval, which sets a design theme, requires landscaping, dictates roof shapes, building heights, building materials and texture, setbacks, and other concerns to assure an appropriate design and a low-profile to prevent any visual intrusion on the horizon when this project is viewed from Kuhio Highway. The proposed development plans do comply with these design guidelines.

Because of the foregoing factors, the project appears to be in conformance with the objectives, policies, and guidelines of the Special Management Area Rules and Regulations.

Physically, a resort area is not a coastal dependent facility and can be located in other areas of the island. However, economically, it becomes coastal dependent since ocean views and water activities become a primary incentive for tourism promotion. Because this project is set back further than most others (200-feet minimum), staff believes that coastal dependent recreation activities can still be pursued by the public. The quality of the experience, however, will probably change, due to the additional people that would be present as a result of the development. Although this may be unacceptable to others, the underlying objectives of the SMA have been considered.

The development of this project will result in a loss of open space since the site is presently vacant and being used for miscellaneous recreation activities (i.e., horseback riding, motorcycling, etc.). Such uses will be discontinued with the exception of those coastal-related activities that can be carried out along the shoreline and and setback area.

Because of its location, it is anticipated that the project will generate additional demands on the Wailua Golf Course for playing time, a concern raised at the previous zoning amendment hearing. At that time, one of the intents for requiring a $500,000 fee for recreational purposes, was to utilize it for expansion of the golf course to accommodate the increased demand.

It is further anticipated that other surrounding recreation areas will have a higher usage as a result of this project, and may increase public service costs for maintenance and development of additional facilities.

20. *REFERENDUM.* Because the Save Nukolii Committee has successfully secured adequate signatures for a referendum vote to reverse the zoning amendment approval of this site from Resort District (RR-20) to Open District (O), it raises a question if the Planning Commission can act on an application that is the subject of an upcoming referenda. In answer to this question, a letter from the County Attorney's office addressed to the Planning Commission is summarized as follows:

    A. The intervenors, based on their review of the applicable common law, urge that the filing and certification of a referendum petition suspends the basic ordinance, and further maintain that the Planning Commission does not have the power to act on the pending permits.

    B. The applicants' attorney claims that the Council's action to sustain the Zoning Amendment Ordinance for the Nukolii site (Ord. No. PM-26-79) and refer it to the 1980 General Election, does not result in a stay of the proceedings and that the Planning Commission is mandated both by common law and statutory law to act on the subject permits.

    C. A careful reading of the relevant Charter provision relating to referendum reveal that the Charter is silent on the question of suspension.

    The conclusion reached by the County Attorney's office is that the Planning Commission must continue to act on the Special Management Area Use Permit and the Class IV Zoning Permit.

    The above conclusion points out that the referendum certification cannot be legally used to defer or deny action on

the applications until the General Election, nor can any recommendations for denial be made based on the pending referendum vote because the underlying Zoning Amendment Ordinance still prevails.

Even though the referendum petition from a legal standpoint cannot be considered in this evaluation, staff believes that it still is a major concern since it reflects a public attitude that is difficult to discount. However, because the County Charter does not "suspend" the ordinance that is the subject of a referenda, staff has no alternative but to follow the recommendation of the County Attorney.

21. *WATER SUPPLY* — At the time the zoning amendment was approved for this project, the water requirements called for the installation of a pump at Wailua Houselots Well No. 3, and adequately sized pipelines from Nonou Tank to Kuhio Highway, and from Leho Drive to the project site. Between the period the zoning amendment was approved in February of 1979 and now, the Water Department has required an additional condition relative to this subject application, calling for the drilling of a deepwell and providing an adequately-sized pump and appurtenances.

The applicants, in their supplement to the final arguments, expressed concern over this condition citing it as unfair since they would have to develop a water supply at their own cost to service projects approved by the Water Department that there was no water for; and that they are being asked to develop more than five (5) times the water source and standby capacity they would need for their own project.

The applicants further state, however, that they are willing to discuss this condition with the Water Department such that an equitable and mutually agreeable solution can be reached.

The applicants further object to the requirement that no building permit be granted until construction drawings for the necessary water facilities are approved by the Water Department, and that the improvements either be con-

structed or a performance bond be posted. The applicant does not object to posting a bond; however, the bond amount is not or cannot be established until final construction drawings have been received and approved.

In checking these concerns with the Water Department, they suggested that their original conditions remain intact, and that details of implementation can be worked out between them and the applicants.

CONCLUSION OF LAW

1. The Planning Commission has jurisdiction over the application as provided under Ordinance No. 164, as amended, and under the Special Management Area Rules and Regulations of the County of Kauai.

2. Due notice of the hearing was given to the applicant and all parties were afforded the opportunity to present evidence and argument on the issue involved.

3. It is concluded that this project meets all the requirements of the Comprehensive Zoning Ordinance, however, it will contribute to the following impacts:

   A. Traffic — The traffic generated by this project will cause Kuhio Highway to reach its capacity and hasten the need for a four (4)-lane highway between Kapaa and Lihue, and the Hanamaulu-Ahukini Bypass road.

   B. Water source — Because the existing water source is at capacity, additional water source and facilities would have to be provided. The drilling of a new deepwell is necessary to provide adequate reserve capacity. This cost, if not burdened by the applicant, would have to be born by the State or County. An alternative would be to share the costs.

      Temporary traffic problems will further occur during construction of a waterline, to run along Kuhio Highway between Wailua and the project site.

This project, however, is not the sole cause of these impacts since other developments in the Kapaa-Lihue region will cumulatively contribute to these problems.

4. It is further concluded that other impacts, particularly the anticipated increase in crime, medical services, energy consumption, rescue operations, etc., are all effects of the overall growth of a region or island, and not caused by a single development in itself. Such effects, however, cannot be overlooked and planning to minimize these problems must continue as the island keeps growing.

   Housing demands are also a symptom of overall growth. However, in this case, where an employment base will be created, it is concluded that some additional employee-housing or government-subsidized housing will be needed in the region.

5. It is further concluded that the tax revenues generated by this project will be adequate to cover the public service costs it is directly responsible for. It must be clarified here, though, that such tax revenues are adequate only if the costs for traffic improvements to Kuhio Highway are not attributed to this project.

6. Relative to the Special Management Area, it is concluded that the project has upheld the objectives, policies, and guidelines of the SMA Rules and Regulations, and although some of the existing recreation activities on the site will have to cease, those that are coastal dependent will be able to continue to take place. Additional usage of surrounding recreational facilities will occur. However, the developer's contribution of $500,000, in-lieu fee for recreational facilities can be utilized to improve such recreation areas.

7. Lastly, although the referendum issue is a primary concern, it is concluded that legally, it cannot be used as a basis for denial, or deferral of this application until the 1980 General Election.

DECISION AND ORDER

It is the decision of the Commission that the application complies with the provisions or Ordinance No. 164, as amended (CZO), and with the Special Management Area Rules and Regulations of the County of Kauai.

It is hereby ordered that CLASS IV ZONING PERMIT Z-IV-80-26 and SPECIAL MANAGEMENT AREA USE PERMIT SMA(U)-80-11 be approved subject to the following conditions:

1. All conditions in Ord. No. PM-26-79 shall be complied with. Because condition No. 10 required recordation of the foregoing conditions, a copy of the recorded covenants shall be submitted to the Planning Department prior to building permit approval.

2. Relative to the beach right-of-way:

   a) A minimum of 15 paved parking stalls shall be provided at the makai end of the beach right-of-way;

   b) metes and bounds descriptions for the right-of-way shall be provided at time of subdivision for dedication purposes;

   c) the applicant shall be responsible for construction and paving the access road, parking, and turn-around area;

   d) a six (6)-feet pedestrian easement parallelling the shoreline shall be provided along the makai boundary of the property and be so recorded.

3. A public restroom to include outdoor showers shall be provided and maintained by the applicant as part of the Phase I development. The location should be in the vicinity of the public right-of-way and shall be determined prior to building permit approval. Sewage disposal for the public restroom shall be in accordance to Department of Health requirements.

4. Conditions to be resolved (meaning that the following conditions may be subject to change if agreed to by the respective agencies) with other review agencies are as follows:

   A. *Public Works Department:*

      1) The rotary-type intersection at the entry shall follow the recommendations of the American Association of State Highway officials;

      2) Should a private wastewater treatment facility be allowed, the developer shall provide an adequate management system, which shall include appropriate bonding or other securities to assure proper operation, maintenance and replacement of the treatment facility. The facility should provide capabilities to digest and dewater sludges produced by it.

   B. *Water Department:*
      In addition to conditions of Ord. No. PM-26-79, the following shall also apply:

      1) The building permit shall not be granted until: (1) the developer prepares and receives Department of Water's approval of construction drawings for necessary water system facilities and either constructs said facilities or posts a performance bond for construction. These facilities shall include: (a) the installation of an adequately-sized pump with associated controls, piping and appurtenances for our existing Wailua Houselots Well No. 3; (b) The subdivider pays the Facilities Reserve Charge (or posts a bond therefore). Said payment (or bond) will be the current charges at the time of receipt. At the present time, these charges are 499 units @ ($420-$140) = $139,720 payable with 20% down and the balance over 5 years at 9% per annum.

   C. *Fire Department:*

      1) Provide access roadways with all weather driving

surface of not less than 20 feet of unobstructured width, with adequate roadway turning radius capable of supporting the imposed loads of fire apparatus and having a minimum of 13 feet, 6 inches of vertical clearance.

2) Provide fire hydrants within 250 to all sections of the proposed buildings in accordance with water department standards for the required fire protection.

3) Provide portable fire extinguishers in compliance with National Fire Protection Association standard 10.

4) The building construction shall comply with the requirements of NFPA Life Safety Code dated 1967.

State Highways Division:

1) Developer shall submit three (3) sets of construction plans of the improvements on Kuhio Highway (acceleration, decelaration, and left-turn storage lanes) for our review and approval. Three weeks minimal lead time is required.

Department of Health:

1) Sewage disposal for the planned project shall conform to the requirements of Chapter 38, Public Health Regulations and shall be approved by the Department of Health.

   a. In addition, the owner and the County of Kauai shall submit to the Department of Health statements providing evidence that the proposed project is consistent with the County of Kauai Wastewater and Water Quality Management plans for the project area.

   b. If possible, the project's sewage system should be connected to either the Lihue Sewage Treatment Plant or the Wailua Sewage Treatment Plant.

2) Restaurants, snack shops, food pantries and liquor dispensers shall conform to the requirements of Chapter 1-A, Food Service and Food Establishment Sanitation Code, Public Health Regulations.

3) Swimming pools shall conform to the requirements of Chapter 1-8, Public Swimming Pools, Public Health Regulation.

4) All structures shall conform to the requirements of Chapter 2, Housing, Public Health Regulations.

5) Air conditioning and ventilating systems shall conform to the requirements of Chapter 28, Air Conditioning and Ventilating, Public Health Regulations.

6) Effective dust and soil erosion control measures shall be implemented during all phases of development by the developer.

7) Debris and grubbed material shall be disposed of in a manner approved by the Department of Health.

8) Due to the general nature of the plans submitted, we reserve the right to make further comments and restrictions on the project when more detailed plans are submitted.

5. The building permit shall not be granted until:

a) sewage disposal requirements are resolved with the Department of Health and the Public Works Department;

b) water facilities contruction plans are reviewed and approved by the Water Department;

c) payment of the $500,000 in-lieu fee;

d) the location of the public restroom and right-of-way have been finalized;

e) a landscaping plan has been reviewed and approved by the Planning Director;

f) as per "Exhibit A" of condition No. 1 in Ord. No. PM-26-79, a report from the Design Review Committee approving the design of the project shall be submitted to the Planning Department.

6. The applicant is advised that prior to and/or during construction and use, additional conditions may be imposed by governmental agencies. The applicant shall resolve those conditions with the respective agencies.

Dated: This ninth day of April, 1980.

BY ORDER OF THE PLANNING COMMISSION
OF THE COUNTY OF KAUAI, STATE OF HAWAII.

5/2/80	S/ Brian Nishimoto
Date	BRIAN NISHIMOTO Planning Director

cc: Mayor
County Attorney
Pub. Works Dept.
Water Dept.
Health Dept.
Fire Dept.
Highways Div.
Taxation Br.
Max Graham
Bill Kaipo Asing
Dept. of Regulatory Agencies

APPENDIX F

EDUARDO E. MALAPIT
MAYOR

MORRIS S. SHINSATO
COUNTY ATTORNEY

COUNTY OF KAUAI
OFFICE OF THE COUNTY ATTORNEY
4396 RICE STREET
LIHUE, KAUAI, HAWAII 96766

March 10, 1980

Mr. Arthur Fujita, Chairman
Planning Commission
County of Kauai
4280 Rice Street
Lihue, Hawaii 96766
Dear Chairman Fujita:

Re: Effect of Referenda on Special Area Use Permit SMA (U)-80-11 and Class IV Zoning Permit Z-IV-80-26 (Pacific Standard Life Insurance Company and John Graham)

On January 30, 1980 the County Clerk certified as sufficient the Referendum Petition seeking to repeal Ordinance No. PM-26-79, which ordinance establishes the underlying zoning for the land which is the subject of the above-referenced permit applications currently pending before the Planning Commission.

Thereafter, on February 5, 1980 the County Council voted to sustain Ordinance No. PM-26-79 and place the referenda matter on the ballot for the 1980 general election.

In view of the filing of the aforementioned referenda petition, a question has arisen concerning the legal capacity of the Planning Commission to consider permit applications that are processed pursuant to an ordinance which is the subject of a referenda.

Consequently, the issue simply stated is whether Ordinance No. PM-26-79 is deemed to be suspended because of the referral of the referenda issue to the voters in the 1980 general election.

In the event the answer to the foregoing inquiry is in the affirmative, the Planning Commission cannot continue to act on permits that are founded upon a zoning ordinance that remains suspended. If, on the other hand, the answer is in the negative, the Planning Commission must act within sixty days as prescribed in the Special Management Area Rules and Regulations.

Prior to drafting the subject memorandum, our office invited the parties to submit legal memoranda representing each party's opinions and recommendations relative to the issue. Copies of the memoranda prepared by each of the parties are attached hereto.

Based upon our review of the memoranda prepared by each of the parties together with independent research compiled by the undersigned, the following discussion and recommendation is submitted to the Planning Commission.

In the first instance the Intervenors, based upon their review of the applicable common law, urge that the filing and certification of a referendum petition suspends the basic ordinance and, as a result, the Intervenors maintain that the Planning Commission does not have the power to act on the pending permits.

In the second instance the Applicants urge that the Council's act to sustain Ordinance No. PM-26-79 and refer the ordinance to the 1980 general election does not result in a stay of the proceedings and as such the Applicants suggest that the Planning Commission is mandated both by common law and statutory law to act on the subject permits.

Despite arguments by the Applicants that the Referendum Article of the Charter clearly provides that ordinances referred to the electorate remain in full force and effect such a conclusion is based largely upon inference because a careful reading of the relevant Charter provisions reveal that the Charter is silent on the question of suspension.

As a general rule, it is well established that a law which is clear and unambiguous on its face need not and cannot be subject to interpretation and only those laws which are of doubtful meaning are subject to the process of statutory interpretation. 2A Sands, Sutherland Statutory Construction, 4th Edition, at 4.

The Supreme Court of the United States stated in the case of *Caminetti v. United States*, 242 U.S. 470, 61 L. Ed. 442. 37 S.Ct. 192 (1917), that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if it is plain . . . the sole function of the courts is to enforce it according to its terms." The court concluded that "where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

The Applicants correctly state the foregoing rules in citing decisions of the Hawaii Supreme Court wherein the Court ruled:

> "The construction or interpretation of a statute may be indulged in only in case of ambiguity or uncertain meaning. Where, as in this case, the language is plain and unmistakable, there is no room for construction — there is nothing to construe.' Hawaiian Hotels v. Borthwick, 35 Haw. 788, 794 (1941); and, thus, it must be given its 'plain and obvious meaning.' Hawaii Consolidated Railway v. Borthwick, 34 Haw. 269, 272 (1937). The Court is bound by the plain, clear and unambiguous language of the statute. University of Hawaii v. Leahi Foundation, 56 Haw. 404, 537 P.2d 1190 (1975)." *In re Grayco Land Escrow, Ltd.*, 57 Haw, 436 (1977).

Our Fifth Circuit Court in *State of Hawaii v. County of Kauai*, Civil No. 1736 (1976), ruled that "The court will not usurp the legislative function by extending a statute because the legislature may have failed to express its meaning through proper words." In view of this holding, coupled with what has been stated by the courts of other jurisdictions, it should be apparent

that one is not free to simply substitute personal subjective interpretations for what is clearly expressed in any given law. Moreover, it is impermissible to infer a legislative intent that is contrary to the express language contained within the law.

In spite of the above-stated rules relating to statutory construction, the Intervenors argue that the Charter should be liberally construed so as to fully effectuate what they believe is an inherent power contained within the principle of referenda, that is, the ordinance must be suspended so as to afford the people the right to vote on the issue before the landowner can acquire vested rights.

In response to the Intervenor's argument for a liberal construction of the Charter provisions on referenda, the following analysis is offered:

> "It has been held that provisions authorizing direct popular participation in law-making should be liberally construed so as not to restrict its use. The same reasoning should apply as well to provisions authorizing referenda. *On the other hand, strict compliance is required with conditions and procedures prescribed for making law by these methods.*" (Emphasis added) 1 Sands, Sutherland Statutory Construction, 4th Edition, at 86. Citing Tyler v. Secretary of State, 229 Md. 397, 184 A2d 101 (1962); People ex rel. Wright v. Kelly, 294 Mich. 503, 293 NW 865 (1940).

Thus, a liberal interpretation may be advanced as suggested by Intervenors only in cases where a given provision is unclear or ambiguous. However, a liberal interpretation should not be extended where, as in the present case, such an interpretation would be extended to infer a significant right or power that is not expressly authorized by the applicable legislation. As a result, procedural issues such as the question of suspension must be strictly construed and strictly complied with.

In addition to the foregoing rules on statutory construction, there exists one other doctrine which, although not squarely on point, may be referenced for the purpose of exploring its under-

lying rationale. Inasmuch as the Applicants view the position of the Intervenors in advocating a suspension argument as an attempt to impose a defacto repeal of Ordinance No. PM-26-79, the following discussion may prove relevant:

> "Interpretation of statutes with regard to the question of whether they effect repeal of prior law by implication is conditioned by a judicially formulated and imposed assumption, or presumption, against change in legal order. Court reports abound in decisions reflecting and endorsing a presumption against repeal by implication.
>
> The bent of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where two acts can, in fact, stand together and both be given consonant operation. Where the repealing effect of the statute is doubtful, the statute is strictly construed to effectuate its consistent operation with previous legislation.
>
> The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of a prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to arise by necessary implication from the later enactment. Still more basic, however, is the assumption that existing statutory law and common law, as well as ancient law, is representative of popular will. As traditional and customary rules, the presumption is against their alteration or repeal. . . ." 1A Sands, Sutherland Statutory Construction, 4th Edition, at 230-31.

Thus, it is evident that the issue of suspension, like the issue of repeal, should be strictly construed to avoid its application in

all but the clearest of cases and only where such an interpretation is consistent with the express intent of the legislative act in question.

In the case at hand the Charter provisions relating to referenda are completely devoid of any reference to the subject of suspension and, as such, the question that remains to be determined is whether the power of referenda can reasonably exist without the concomitant power of suspension.

The Intervenors argue that all of their research indicates that when a properly filed and certified referendum is filed against a legislative enactment the challenged ordinance is suspended from taking effect.

The following is a brief compilation of the relevant statements contained within the various treatises referred to by the Intervenors:

> "The effect of a properly filed referendum petition is to suspend the subject legislation and to strip the legislative body of jurisdiction to legislate on the subject matter until the electors have had an opportunity to vote on the measure referred." 1 Anderson, American Law of Zoning, 2nd Edition, at 230-31.
>
> "In accordance with the general rule pertaining to referenda, a zoning ordinance remains suspended after a petition for a referendum is duly filed until decision by the electorate on the issue." 8A McQuillin, Municipal Corporations, 3rd Edition, at 181.
>
> "Even if there is no express provision postponing the effectiveness of a referred measure, where a petition for a referendum is filed, the enactment that it seeks to have submitted to a vote of the people is suspended from taking effect." 42 Am Jur 2d, at 713.
>
> "The filing of a proper petition for a referendum does not of itself nullify the ordinance or legislative action of the council, but merely suspends it until the referendum election is held, the ordinance during the

period which it remains subject to a referendum having no validity as a law." 62 C.J.S., at 882-83.

In each of the above-referenced treatises, the authors and editors enumerate numerous judicial decisions that apparently formed the basis upon which all of the foregoing statements were made. A careful review of all of the cases cited in the texts reveals, however, that in each and every case the jurisdiction in question had specific enabling legislation that expressly provided for a suspension of the legislation that was the subject of a referenda. Consequently, in view of the fact that none of the above treatises or legal precedents squarely addressed the issue of suspension where no express legal authority existed, they cannot be relied upon to be dispositive of the question before us today.

The only judicial decisions discovered by this writer that posed factual situations similar to those present in the case at hand were the two cases reported in the Applicants' memorandum. They are *Walters v. Cease*, 388 P.2d 263 (1964), and *State ex rel. Morton v. Howard*, 248 P 44 (1926). Both decisions are quoted at length in the Applicants' memorandum and, as a result, no effort will be made to duplicate those statements in this memorandum.

Briefly, the Supreme Court of Alaska in *Walters* and the Supreme Court of Nevada in *Morton* held that the filing of a referendum petition does not suspend the effect or operation of an act referred to the electorate in an election. The Courts reasoned that where the framers of a referenda law failed to provide for the suspension of legislation pending a vote thereon by the electorate, the courts are not authorized to infer such a provision.

Based on the foregoing, it is concluded that it is not unreasonable or absurd to hold that in the absence of express legislative authority, there can be no suspension of an ordinance which is the subject of a referenda. This conclusion is clearly in keeping with the rules of statutory construction as expressed in the following decisions of the Hawaii Supreme Court:

". . . where there is no ambiguity in the language of a statute and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning." *State v. Park*, 55 Haw. 610 (1974), at 614.

"We have said that this court is bound by the plain, clear and unambiguous language of a statute unless the literal construction would produce an absurd and unjust result and would be clearly inconsistent with the purposes and policies of the statute." *In re Spencer*, 60 Haw. 497 (1979), at 499.

Finally, it should be noted that following the decision of the Alaska Supreme Court in *Walters v. Cease*, supra, in 1964 the constitutional provisions of the State of Alaska relating to referenda have remained unchanged to this day. This acquiescence or tacit approval by the legislature is a further indication that the power of referenda need not necessarily include the power of suspension in order that referenda can be effectuated. The Hawaii Supreme Court has ruled that where a court has construed a statute and the legislature has had abundant opportunity to give a statute a different meaning but fails to do so, such failure amounts to legislative approval of the judicial construction. *Honolulu Star Bulletin v. Burns*, 50 Haw. 603 (1968), at 607.

In view of the above discussion and based upon the legal points and authorities cited herein, it is recommended that the Planning Commission continue to act on Special Management Area Use Permit SMA(U)-80-11 and Class IV Zoning Permit Z-IV-80-26.

Respectfully submitted,

S/ Michael J. Belles

MICHAEL J. BELLES
Second Deputy County Attorney

MJB:bkm

Enc.

APPROVED:

S/ Morris S. Shinsato

MORRIS S. SHINSATO
County Attorney

APPENDIX G

NO. 8267
IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1982

COUNTY OF KAUAI,
Petitioner-Appellee,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY, and GRAHAM BEACH PARTNERS,
Respondents-Appellees,

vs.

COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant.

CIVIL NO. 2388

ORDER

Upon consideration of Respondents-Appellees' Petition for Additional Time to Present Motion for Reconsideration, and the papers in support, and upon consideration of the record,

IT IS HEREBY ORDERED that the Respondents-Appellees are granted until November 15, 1982, to file their Motion for Reconsideration.

DATED: Honolulu, Hawaii, October 28, 1982.

BY THE COURT:

[seal] S/ William S. Richardson

Chief Justice

[Filed: Oct. 28, 1982]

APPENDIX H

NO. 8267
IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1982

COUNTY OF KAUAI,
Petitioner-Appellee,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,
Respondents-Appellees,

and

COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant,

vs.

EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Third-Party Defendant-Appellee.

CIVIL NO. 2388

APPEAL FROM THE DECISION, ORDER AND JUDGMENT FILED FEBRUARY 18, 1981

FIFTH CIRCUIT COURT

HONORABLE KEI HIRANO, JUDGE

JUDGMENT ON APPEAL

Pursuant to the Opinion of the Supreme Court of the State of Hawaii filed October 14, 1982 and the Order Denying Motion For Reconsideration filed December 6, 1982, the judgment of the lower Court is reversed and the case is remanded for further proceedings consistent therewith.

DATED: Honolulu, Hawaii, December 27, 1982.

BY THE COURT:

S/ Clement J.H. Chun
Clerk

APPROVED:

S/ William S. Richardson
Chief Justice

[seal]

[Filed: Dec. 27, 1982]

APPENDIX I

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1982

COUNTY OF KAUAI,
Petitioner-Appellee,

v.

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,
Respondents-Appellees,

and

COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant,

v.

EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Third-Party Defendant-Appellee

NO. 8267

MOTIONS FOR RECONSIDERATION

December 6, 1982

RICHARDSON, C.J., LUM, J., CIRCUIT JUDGE GREIG IN PLACE OF NAKAMURA, J., RECUSED, AND RETIRED JUSTICES OGATA AND MENOR ASSIGNED TEMPORARILY

Per Curiam. The Motions for Reconsideration are hereby denied without argument.

S/ William S. Richardson
Herman T.F. Lum
Ronald B. Greig
Thomas S. Ogata
Benjamin Menor

MORRIS SHINSATO, County Attorney, and MICHAEL K. ABE, Second Deputy County Attorney, County of Kauai, for Petitioner-Appellee, County of Kauai, and Third-Party Defendant-Appellee Eduardo E. Malapit, in his capacity as Mayor of the County of Kauai,

and

EDWARD A. JAFFEE, RICHARD R. CLIFTON and MILTON M. YASUNAGA (Cades Schutte Fleming & Wright of counsel),

WALTON D. Y. HONG (Masuoka & Hong of counsel),

LEON SILVERMAN and SHELDON RAAB (Fried, Frank, Harris, Shriver & Jacobson of counsel), and

FRED P. BOSSELMAN (Ross, Hardies, O'Keefe, Babcock & Parsons of counsel),

for Respondents-Appellees Pacific Standard Life Insurance Company and Graham Beach Partners,

on the motions.

[Filed: Dec. 6,1982]

APPENDIX J

NO. 8267
IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

COUNTY OF KAUAI,
Petitioner-Appellee,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,
Respondents-Appellees,

and

COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant.

vs.

EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Third-Party Defendant-Appellee.

CIVIL NO. 2388

APPEAL FROM THE DECISION, ORDER AND JUDGMENT FILED FEBRUARY 18, 1981

FIFTH CIRCUIT COURT

HONORABLE KEI HIRANO, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Pacific Standard Life Insurance Company and Graham Beach Partners, the Respondents-Appellees above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Hawaii, entered herein on December 27, 1982,

reversing the judgment of the Fifth Circuit Court of the State of Hawaii, which judgment of the Supreme Court of Hawaii was based on its decision entered on October 14, 1982, and its *per curiam* order denying motions for reconsideration entered on December 6, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2). Since 28 U.S.C. § 2403(b) may be applicable to this appeal, notice thereof is being given herewith to the Attorney General of the State of Hawaii.

Dated: February 28, 1983

S/ Edward A. Jaffe
Edward A. Jaffe
1000 Bishop Street
P. O. Box 939
Honolulu, Hawaii 96808

S/ Leon Silverman
Leon Silverman, P.C.
One New York Plaza
New York, New York 10004

Counsel for Pacific Standard
Life Insurance Company and
Graham Beach Partners

To:

CLERK, Supreme Court of
the State of Hawaii

CLERK, Circuit Court for the Fifth Circuit,
State of Hawaii

MORRIS S. SHINSATO
County Attorney
MICHAEL K. ABE
Second Deputy County Attorney
County of Kauai,
State of Hawaii
4396 Rice Street
Lihue, Kauai, HI 96766

Attorneys for Petitioner-Appellee
COUNTY OF KAUAI and Third-Party
Defendant-Appellee
MAYOR OF THE COUNTY OF KAUAI

ROBERT M. HARRIS, ESQ.
Harris & Smith
201 Model Progress Building
1188 Fort Street Mall
Honolulu, Hawaii 96813

KAREN M. HOLT, ESQ.
P. O. Box 427
Kaunakakai, Molokai, HI 96748

LINDA B. LEVY, ESQ.
P. O. Box 1702
Lihue, Kauai, HI 96766

LAWRENCE D. McCREERY, ESQ.
American Savings Building
P. O. Box 238
Kapaa, Kauai, HI 96746

SIDNEY W. WOLINSKY, ESQ.
Public Advocates, Inc.
1535 Mission Street
San Francisco, California 94103

Attorneys for Respondent-Appellant
COMMITTEE TO SAVE NUKOLII

HONORABLE TANY S. HONG
Attorney General of the
State of Hawaii
State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813

[Filed: Feb. 28, 1983]

NO. 8267
IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

COUNTY OF KAUAI,
Petitioner-Appellee,

vs.

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,
Respondents-Appellees,

and

COMMITTEE TO SAVE NUKOLII,
Respondent-Appellant.

vs.

EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Third-Party Defendant-Appellee.

CIVIL NO. 2388

APPEAL FROM THE DECISION, ORDER AND JUDGMENT FILED FEBRUARY 18, 1981

FIFTH CIRCUIT

HONORABLE KEI HIRANO, JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February 1983 a copy of the foregoing Notice of Appeal was duly mailed, first-class postage prepaid, to each of the following attorneys at their respective post office addresses:

MORRIS S. SHINSATO
County Attorney
MICHAEL K. ABE
Second Deputy County Attorney
County of Kauai,

State of Hawaii
4396 Rice Street
Lihue, Kauai, HI 96766

Attorneys for Petitioner-Appellee
COUNTY OF KAUAI and Third-Party
Defendant-Appellee
MAYOR OF THE COUNTY OF KAUAI

ROBERT M. HARRIS, ESQ.
Harris & Smith
201 Model Progress Building
1188 Fort Street Mall
Honolulu, Hawaii 96813

KAREN M. HOLT, ESQ.
P. O. Box 427
Kaunakakai, Molokai, HI 96748

LINDA B. LEVY, ESQ.
P. O. Box 1702
Lihue, Kauai, HI 96766

LAWRENCE D. McCREERY, ESQ.
P. O. Box 238
Kapaa, Kauai, HI 96746

SIDNEY M. WOLINSKY, ESQ.
Public Advocates, Inc.
1535 Mission Street
San Francisco, California 94103

Attorneys for Respondent-Appellant
COMMITTEE TO SAVE NUKOLII

HONORABLE TANY S. HONG
Attorney General of the
State of Hawaii
State Capitol
415 S. Beretania Street
Honolulu, Hawaii 96813

I hereby further certify that all parties required to be served have been served.

Dated: February 28, 1983

S/Leon Silverman

Leon Silverman, P.C.

APPENDIX K

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES

U.S. Constitution amend. V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution amend. XIV § 1

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Charter of the County of Kauai, Hawaii, art. V, § 5.03(B)

> Voters seeking referendum on an ordinance shall submit a referendum petition addressed to the council, identifying the particular ordinance and requesting that it be either repealed or referred to the voters of the county.

Charter of the County of Kauai, Hawaii, art. V, § 5.03(C)

> Each initiative or each referendum petition must be signed by not less than twenty percent (20%) of the number

of eligible registered voters in the last preceding general election.

Charter of the County of Kauai, Hawaii, art. V, § 5.07(A)-(C)

A. The county council shall proceed immediately to consider an initiative or referendum petition which has been determined sufficient in accordance with the provisions of this article. If an initiative petition is concerned, the ordinance it proposes shall at once be introduced subject to the procedures required for ordinances under Article IV of this charter; however, not more than sixty (60) days shall elapse between the time of first reading of the initiative proposal as a bill and completion of action to adopt, amend, or reject the same. If a referendum petition is concerned, the ordinance to which that petition is directed shall be reconsidered by the council; and not later than thirty (30) days after the date on which the petition was determined sufficient, the council shall, by ordinance, repeal, or, by resolution, sustain the ordinance.

B. If the council rejects an initiative amendment proposal or passes it with an amendment unacceptable to a majority of the petitioner's committee, or if the council fails to repeal an ordinance reconsidered pursuant to a referendum petition, it shall submit the originally proposed initiative ordinance or refer the reconsidered ordinance concerned to the voters of the county at the next general election.

C. The council may, in its discretion, and under appropriate circumstances, provide for a special election.

Charter of the County of Kauai, Hawaii, art. V, § 5.09

Results of Election. If a majority of the voters voting upon a proposed initiative ordinance shall vote in favor of it, the ordinance involved shall be considered adopted upon certification of the election results. If a majority of the voters voting upon a referendum ordinance shall vote against it, the ordinance involved shall be considered repealed upon certification of the election results.

Charter of the County of Kauai, Hawaii, art. V, § 5.11

> A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum.

Charter of the County of Kauai, art. XXII, § 22.07(E) (enacted at the General Election of November 4, 1980 and as codified by the County Clerk of the County of Kauai)

> When a referendum petition or amended petition has been certified as sufficient by the County Clerk, the Ordinance sought to be repealed in the petition shall not be effective and shall be deemed suspended from the date the petition is certified as sufficient until the voters have voted on the measure and the election results have been certified as provided in this Article.

County of Kauai, Hawaii, Referendum Petition (certified on January 30, 1980 and enacted on November 25, 1980 upon certification of the results of the General Election of November 4, 1980)

> BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUAI, STATE OF HAWAII, OR BY A MAJORITY VOTE OF THOSE VOTING ON THE ISSUE AT THE ELECTION IN WHICH THE ISSUE IS PLACED ON THE BALLOT:
> SECTION 1: Ordinance #PM-26-79, Bill 572 (as amended) is hereby repealed in its entirety.
> SECTION 2: This ordinance shall take effect on its approval.

ORDINANCE NO. PM-26-79

BILL No. 572
(AS AMENDED)

AN ORDINANCE AMENDING ORDINANCE NO. 164 COMPREHENSIVE ZONING ORDINANCE OF THE COUNTY OF KAUAI, POR. TMK: 3-7-03:7
(Pacific Standard Life Insurance Co.)

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUAI, STATE OF HAWAII:

SECTION I. That the Zoning Map ZM-400 is hereby amended by changing the present "Agriculture and Open Districts" to Resort District RR-20 for 25 acres on the Kapaa or northern portion of TMK: 3-7-03:7, Hanamaulu, Kauai, a modification of the recommendation of the Planning Commission, subject to the following conditions:

1. The design criteria outlined in "Exhibit A" shall be complied with.

2. The applicant or developer(s) shall provide and construct at the first stage a minimum number of public parking stalls, to be determined by the Planning Department, at the South end of the property to service the public beach right-of-way. Improvements shall further include a vehicular turn-around area at the East end (makai end) of the beach right-of-way noted in the plan.

3. The applicant shall provide acceleration, deceleration lanes and left-turn storage lanes with possible channelization, in accordance to the State Highways Division requirements.

4. As required by the Water Department, and pursuant to its rules and regulations, the applicant shall provide:

   a) A 16-inch main extension of approximately 8,000 LF from Nonou Tank in Wailua Houselots to the intersection of Haleilio Road and Kuhio Highway;

b) A 16-inch main extension of approximately 9,800 LF from the intersection of Leho Drive and Kuhio Highway to the intersection of Kuhio Highway and the access road;

c) A 12-inch main approximately 1,500 LF along the access road to the project site; and

d) An adequately-sized pump with associated controls, piping and appurtenances in the existing Wailua House lots Well No. 3. The cost of such installation shall be refundable in the same manner as the water main extension.

5. As required by the Public Works Department, the proposed access road shall be constructed in accordance to County road standards.

6. As represented by the applicant, the first phase development on the 25 acres to be rezoned shall contain a maximum of 350 hotel units and 150 multi-family units. Should the multi-family units be operated as a hotel, they shall be used as single units and shall not be divided further into additional units regardless of the zoning designation for the property.

7. The applicant shall provide a $500,000 in-lieu fee for recreational facilities and outright contribution for its first phase for the unrestricted use of the County. The contribution shall be due upon approval of a building permit for the first phase construction. Further, the $500,000 in-lieu fee shall include any fee that may be assessed pursuant to ordinance No. 304.

8. Should the applicant not perform as represented and in accordance to the conditions of approval, and should no substantial construction take place within three (3) years from the date of approval of the first phase, and within three (3) years after the completion of each phase, the zoning for the parcel, or the unbuilt portion of the parcel shall automatically revert back to the original "Agriculture" and "Open" districts. The Planning Commission may grant time

extensions to the applicant should implementation of the project be delayed for justifiable reasons beyond the control of the applicant. Substantial construction, for these purposes, would mean at least completion of the building foundations.

9. Prior to and during construction and development, all applicable State and County laws, codes, ordinances, rules and regulations be complied with.

10. All of the conditions contained herein shall be covenants running with the land for the entire parcel and shall be so recorded in the Bureau of Conveyances.

11. The applicant may apply for rezoning on the remaining portions of the subject property as and when the applicant can demonstrate the necessity for development of the subsequent phases on the subject site.

SECTION II. If any provision of this ordinance or application thereof to any person or circumstances is held invalid, the remainder of this ordinance or the application of the provisions to other persons or circumstances shall not be affected thereby.

SECTION III. The Planning Commission is directed to note the changes on the official Zoning Map ZM-400 on file with the Commission, the general configuration to follow the map attached hereto to contain 25 areas, more or less. All applicable provisions of the Comprehensive Zoning Ordinance shall apply to the district as amended.

SECTION IV. This ordinance shall take effect upon its approval.

INTRODUCED BY:

CERTIFICATE OF THE COUNTY CLERK

I hereby certify that hereto attached is a true and correct copy of Bill No. 572, as amended, which was passed on second and final reading by the Council of the County of Kauai at its meeting held on February 1, 1979, by the following vote:

FOR ADOPTION: Baptiste, Hew, Tsuchiya, Yotsuda TOTAL—4,

AGAINST ADOPTION: Sarita, Yadao, Yukimura TOTAL—3,

ABSENT/EXCUSED & NOT VOTING: None TOTAL—0.

S/ Tad T. Miura
Tad T. Miura
County Clerk, County of Kauai

Lihue, Hawaii
February 2, 1979
ATTEST:

S/ Robert K. Yotsuda
Robert K. Yotsuda
Chairman & Presiding Officer

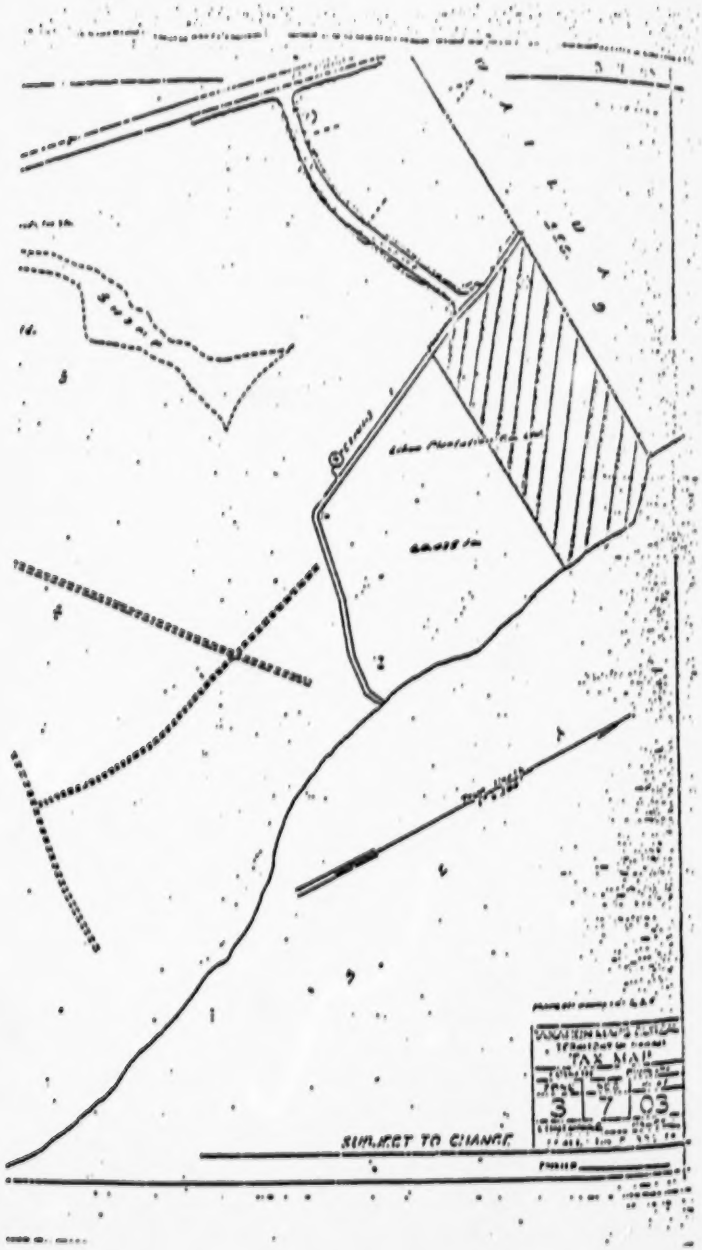
Date of transmittal to the Mayor:

February 2, 1979

Approved this 2nd day of
February, A. D. 1979.

S/ Eduardo E. Malapit
Eduardo E. Malapit
Mayor
County of Kauai

[EXHIBIT "A" HERETO OMITTED]


TAX MAP
3 7 03
SUBJECT TO CHANGE

ORDINANCE NO. 334 BILL NO. 432, Draft 1
(as amended)

AN ORDINANCE ESTABLISHING GENERAL PLAN MAP CHANGES RESULTING FROM THE ADOPTION OF THE LIHUE DEVELOPMENT PLAN

WHEREAS, the County of Kauai has completed a comprehensive study of the Lihue area; and

WHEREAS, the findings and recommendations of said study are articulated in the Lihue Development Plan report and maps; and

WHEREAS, the Development recommends changing certain General Plan land use designations and the Planning Commission and the County Council have scheduled public hearings relative to such changes on in Lihue; now, therefore,

BE IT ORDAINED BY THE COUNCIL OF THE COUNTY OF KAUAI:

SECTION 1. That the Lihue Development Plan Land Use Map and Circulation Map is hereby adopted as the revised General Plan Land Use Map for the Lihue area, indicating the general land use designations and circulation patterns as shown thereon for the respective areas. The following are the recommended changes to the County General Plan:

A. Change from Agriculture and Open to Public (Owner: University of Hawaii) 1
Puhi—along the north edge of Kaumualii Highway opposite the junction of Puhi Road and Kaumualii Highway.
Tax Key: 3-4-05: 6,7,8,9 Area: 199± acres

B. Change from Multi-Family Residential to Park (State of Hawaii) 2
Nawiliwili—property bounded by Waapa Road, Wilcox Road and Nawiliwili Road.
Tax Key: 3-2-04: 9 & 10 Area: 1.48 acres

C. Change from Single-Family Residential and Commercial to Project District (Lihue Plantation/Weinberg) 5
Lihue—along east side of Kuhio Highway between the Wilcox Hospital and the Ala Moana Bowling Alley.
Tax Key: 3-7-01: Por. 1 Area: 30 acres

D. Change from Industrial and Single Family Residential to Commercial (Lihue Plantation Co.) 7
Hanamaulu—back of existing commercial establishments
Tax Key: 3-8-02: Por. 1

E. Change from Agriculture to Public (Lihue Plantation Co.) 9
Lihue—area north of the Lihue Industrial Park, a portion of which is already occupied by the sports stadium
Tax Key: 3-6-02: Por. 1 Area: (See exhibit map for location)

F. Change from Open and Agriculture to Resort (Lihue Plantation Co./Walter Shimoda A/S) 11
Wailua—Nukolii Dairy on the south end of the Wailua Golf Course.
Tax Key: 3-7-03: Por. 1 Area: (See exhibit map for location)

G. Change from Single-Family Residential, Industrial, Park and Commercial to Project District (Grove Farm Company, Inc.) 14
Puhi—bounded by Kaumualii Highway to the north and Puhi Road to the east.
Tax Key: 3-3-02: Por. 1 Area: 58± acres

H. Change from Multi-Family Residential to Agriculture (Lihue Plantation Co.) 15
Lihue—along the north side of Kaumualii Highway, approximately 400 feet west of the junction of Nawiliwili Road and Kaumualii Highway.
Tax Key: 3-8-05: Por. 1 Area 20± acres

I. Change from Project District to Open (Kanoa Estate, Inc.) 17
Niumalu—north side of Hulemalu Road in the vicinity of the Menenhune Fish Pond Lookout.
Tax Key: 3-2-01: Por. 1 Area: 21 acres

J. Change from Project District to Open (Various owners) 18

Niumalu—abutting Niumalu Stream, north of Niumalu Road.
Tax Key: 3-2-03: 8,9,10,11,12,13,14,15,16,17,26
Area: 48.9 acres

K. Change from Agriculture and Open to Public (Lihue Plantation Co.) 19
Lihue—area around Lihue Airport
Tax Keys: 3-5-01: Por. 3, Por. 6
3-7-02: Por. 1 Area: 610± acres

L. Change from Public to Agriculture (Lihue Plantation Co.) 20
Lihue—area around Lihue Airport
Tax Key: 3-5-01: Por. 6 Area: 10.00± acres

M. Change from Single-Family Residential to Agriculture (Lihue Plantation Co.) 21
Lihue—area along north side of Ahukini Road and east of the Wilcox Memorial Hospital site.
Tax Key: 3-7-01: Por. 1 Area: 150± acres

N. Change from Project District to Agriculture (Lihue Plantation Co.) 23
Hanamaulu—north of Hanamaulu Town Tract.
Tax Key: 3-7-03: Por. 1 Area: 66± acres

O. Change from Multi-Family Residential to Commercial (Bernice Midkiff Bisbee) 25
Lihue—junction of Hoolako and Rice Street.
Tax Key: 3-6-20: 1 (Approx. 3.2 acres)

P. Change from Single-Family Residential to Project District (Lihue Plantation Co./Harry Weinberg) 6
Lihue—along north side of Ahukini Road approximately 500 feet east of the intersection of Kuhio Highway and Ahukini Road.
Tax Key: 3-7-01: Por. 1 Area: (See exhibit map for location)

*It is the Committee's intent that the Project District area contained in this amendment be incorporated with amendment #C, therefore making amendment Nos. C and P a contiguous Project District area.

Q. Change from Agriculture to Resort (Lihue Plantation Co.) 8
Nawiliwili—areas abutting the Kauai Surf Golf Course.
Tax Key: 3-5-01: Por. 6 Area: (See exhibit map for location)

R. Change from Single-Family Residential to Project District Residential (Lihue Plantation Co.) 10
Lihue—area makai of the Wilcox Hospital
Tax Key: 3-7-01: Por. 1 Area: 14 ± acres

S. Change from Open to Single Family Residential (Lihue Plantation Co./Koanalu Associates & Kaumualii Investment Co.) 13
Lihue—north side of Kaumualii Highway on the outskirts of Lihue town.
Tax Key: 3-8-05: Por. (Approx. 14 acres)

Note: The underscored number which follows the property owner is the cross reference identification to the original list of proposed amendments as submitted by the Planning Commission.

SECTION 2. This ordinance shall take effect upon its approval.

CERTIFICATE OF THE COUNTY CLERK

I hereby certify that hereto attached is a true and correct copy of Bill No. 432 (Draft 1), as amended, which was passed on second and final reading by the Council of the County of Kauai at its meeting held on November 15, 1977, by the following vote:

FOR ADOPTION: Fernandes, Hew, Sarita, Tsuchiya, Yotsuda, Yukimura, Gonsalves TOTAL—7,
AGAINST ADOPTION: None TOTAL—0,
ABSENT & NOT VOTING: None TOTAL—0.

Dated at Lihue, Kauai, Hawaii, this 16th day of November, A. D. 1977.

S/ Tatsuo Kato
Tatsuo Kato
Deputy County Clerk
County of Kauai

ATTEST:

S/ Louie Gonsalves, Jr.
Louie Gonsalves, Jr.
Chairman & Presiding Officer

Date of transmittal to the Mayor: November 21, 1977

Approved this 29th day of November, A. D. 1977.

S/ Eduardo E. Malapit
Eduardo E. Malapit
Mayor
County of Kauai

[EXHIBIT MAPS TO ORDINANCE OMITTED]

COUNTY COUNCIL
COUNTY OF KAUAI

Resolution

RESOLUTION RELATING TO REFERENDUM PETITION TO REPEAL ORDINANCE NO. PM-26-79 (1979)

BE IT RESOLVED BY THE COUNCIL OF THE COUNTY OF KAUAI, STATE OF HAWAII, THAT:

Section 1. Ordinance No. PM-26-79 (1979), attached hereto, relating to the rezoning of TMK: 3-7-03:7 (Pacific Standard Life Insurance Co.) is hereby sustained.

Section 2. Any valid petition for the referendum of the aforesaid Ordinance No. PM-26-79 (1979) shall be placed on the ballot for the 1980 general election.

Section 3. This resolution shall take effect upon its approval.

Introduced By: STANLEY L. BAPTISTE
Councilman

Approved:

S/ Stanley L. Baptiste
Councilman

Councilman

S/ Burt K. Tsuchiya
Councilman

Councilman

Councilman

S/ Robert K. Yotsuda
Councilman

S/ Jerome Hew
Councilman

We hereby certify that Resolution No. 151 was adopted by the Council of the County of Kauai, Lihue, Kauai, Hawaii, on February 5, 1980.

S/ Tatsuo Kato
County Clerk

S/ Robert K. Yotsuda
Chairman & Presiding Officer

Dated: 2/5/80

Adopted

	Aye	No	A/B
Baptiste	x		
Hew	x		
Sarita		x	
Tsuchiya	x		
Yadao		x	
Yotsuda	x		
Yukimura		x	
	4	3	0

APPENDIX L

OTHER STATUTES AND ORDINANCES

Hawaii Rev. Stat. § 1-3 (1976)

Laws not retrospective. No law has any retrospective operation, unless otherwise expressed or obviously intended.

Hawaii Rev. Stat. § 1-10 (1976)

Effect of repeal on accrued rights. The repeal of any law shall not affect any act done, or any right accruing, accrued, acquired, or established, or any suit or proceedings had or commenced in any civil case, before the time when the repeal takes effect.

Charter of the County of Kauai, Hawaii § 15.06

General Plan. The council shall adopt and may, from time to time, modify a general plan setting forth in graphic and textual form policies to govern the future physical development of the county. Such plan may cover the entire county and all of its functions and services or may consist of a combination of plans covering specific functions and services or specific geographic areas which together cover the entire county and all of its functions and services. The general plan shall serve as a guide to all future council action concerning land use and development regulations, urban renewal programs and expenditures for capital improvements.

Charter of the County of Kauai, Hawaii § 15.08

Adoption of the General Plan and Development Plans. The council shall adopt the general plan or any development plan by ordinance. The general plan and all development plans shall be kept on file in the office of the planning department. The current general plan and all development plans and all the amendments thereto adopted by resolution prior to January 2, 1977, are hereby ratified without further action of the council.

Charter of the County of Kauai, Hawaii § 15.10

Zoning Ordinances. The council shall enact zoning ordinances which shall contain the necessary provisions to carry out the purpose of the general plan.

County of Kauai, Hawaii, Rev. Code Or. § 1-43

Effect on rights accrued. The repeal of any ordinance or resolution shall in no case affect any act done, or any right accruing, acquired or established, or any suit or proceedings had or commenced in any civil case, before the time when the repeal shall take effect.

No. 82-1477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF HAWAII

MOTION TO DISMISS OR AFFIRM

ROBERT L. GNAIZDA
SIDNEY M. WOLINSKY
ANITA P. ARRIOLA
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

ROBERT HARRIS
Harris & Smith

LINDA B. LEVY

Counsel for Appellee
Committee to Save Nukolii

March 19, 1983

QUESTIONS PRESENTED

1. Whether a non-final decision by the Hawaii Supreme Court, which rests on adequate non-federal grounds and remands to determine remedies after further discovery, is reviewable by this court.

2. Whether alleged federal questions never decided in the state courts nor raised until after a decision and judgment of the highest state court are reviewable by this Court.

3. Whether Petitioners, who under state law failed to acquire vested rights in a prospective development, may relitigate its case in this Court on the basis of factual issues determined adversely to them in the state court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 82-1477

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY
and GRAHAM BEACH PARTNERS,
Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI,
and EDUARDO E. MALAPIT, in his capacity as
MAYOR OF THE COUNTY OF KAUAI,
Appellees.

MOTION TO DISMISS OR AFFIRM

Respondent in the above-entitled case moves to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Hawaii on the ground that no substantial federal question exists.

STATEMENT OF THE CASE

A. Facts

Petitioners[1] seek review of questions never raised until after a decision by the Hawaii Supreme Court and based entirely on numerous factual assertions determined adversely to them.

In 1974 Petitioners here, [collectively "Graham"] purchased shoreline property in Kauai, known as Nukolii (App. at A-4). Like all the surrounding property, it had been zoned for decades open space/agricultural use (App. at A-5). Graham hoped to build condominiums and a hotel, and in 1979 persuaded the County Council to rezone part of its property to "resort" (App. at A-5). Immediately thereafter, the Committee to Save Nukolii, a broadbased citizen coalition, and Respondents here ["the Committee"] obtained certification of a referendum to reinstate the area-wide zoning (App. at A-5).

Instead of awaiting the impending referendum, Graham accelerated efforts to obtain building permits. They obtained a

---

[1]As discussed below, the constitutionality of the Kauai County Charter referendum provisions was never drawn in question or passed upon by the state court. This case is therefore not properly before this Court by appeal and should be treated as a petition for certiorari. 28 U.S.C.A. § 2103. *See Kulko* v. *Superior Court of California*, 436 U.S. 84, *reh. den.*, 438 U.S. 908 (1978). Hence, Graham Beach is hereafter referred to as "Petitioner" and the Jurisdictional Statement as the "Petition."

condominium permit only four days (App. at A-6, -21) and one for the hotel only one day prior to the referendum vote. (App. at A-6) On November 4, 1980, the people of Kauai passed the Referendum 10,794 to 5,618, the largest margin in any Kauai election (App. at A-6). On November 4, 1980, (1) Graham had commenced construction of several condominium foundations using a permit obtained by misrepresenting the kind of sewage system to be used (App. at A-21, n.18-19), and (2) no construction contract was signed for the hotel and no work at all had begun. Nevertheless, the Developer decided to undertake a "gamble" and started construction while the case was in litigation (App. at A-19, n.15).

B. Proceedings and Rulings Below

Kauai filed for declaratory judgment in state trial court on November 25, 1980, naming Graham and the Committee as parties (App. at A-6). Graham advanced no federal arguments and moved for summary judgment, arguing that under state law the County was equitably estopped from enforcing its zoning. The trial court granted the motion (App. at A-6, -7).

On appeal, the state Supreme Court, in a unanimous decision, reversed. It found that Graham had failed to establish facts to prove any one of the four elements required under Hawaii law for equitable estoppel (App. at A-12 to A-22). First, analyzing the evidence, which included Petitioners' contracts and the particular building permits, the court found that the requisite showing under state law of an 'official assurance' had not been made (App. at A-17). Second, the court examined the precise sequence of events, the representations of Petitioners and the loan documents and concluded that "the good faith requirements of zoning estoppel [were] not demonstrated by the developers"

(App. at A-20). Third, the court found as a fact that in spite of exaggerated claims made by Graham, allowable expenditures made were insufficient to establish equitable estoppel (App. at A-19). Finally, the court made specific findings, based on Hawaii Real Estate Commission reports and other evidence that reliance by Petitioners was "unreasonable" (App. at A-20), that they had engaged in a "race of diligence to undermine the referendum process" (App. at A-21), and that the actions taken by Petitioners were "speculative" (App. at A-21) and, based on long standing Hawaii development practice, "could not give rise to reasonable expectations upon which to base investments" (App. at A-24).

Graham filed a Motion for Reconsideration alleging for the first time constitutional issues which it admitted had "never been briefed." The motion was denied *per curiam*.

ARGUMENT

I. THE DECISION BELOW IS NOT A FINAL JUDGMENT. IT REMANDS TO DETERMINE REMEDIES AND DAMAGES AND WILL REQUIRE EXTENSIVE CONTINUED PROCEEDINGS.

Jurisdiction of this Court is predicated on "final judgments" of the highest state court. 28 U.S.C.A. § 1257. This Court has consistently refused to review state court judgments that determine liability but remand for damages, *see e.g., Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U.S. 251 (1917), or those that require further continued proceedings. *See San Diego Gas & Elec. Co.* v. *City of San Diego*, 420 U.S. 621 (1981). This case fits squarely within both exceptions. The Supreme Court below determined liability and remanded to determine

the appropriate remedy (App. at A-25, n.22).[2] The remand to the trial court, which will be extensive and evidentiary, thus renders the decision non-final and precludes review.[3]

Moreover, in *San Diego Gas & Elec. Co., supra*, this Court remanded because the state court had not decided whether any taking had in fact occurred. This case presents an even clearer situation for this Court to decline jurisdiction. Graham's "taking" claim, if any, is necessarily dependent on the scope of its property rights and evidence to establish those rights was never presented to the state courts. Because of the absence of such information as well as the failure of the state court to decide any "taking" question, Petitioners lack both the factual and legal bases for any such claim.

The final judgment rule "derives added force" when a state court decision is involved, *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945), particularly because of "the policy against premature constitutional adjudications." *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 71 (1948). The Court should therefore dismiss this Petition or affirm the Hawaii Supreme Court's decision.

---

[2]For example, any public improvements (Petition at 11–12, 21 n.16) can be accommodated by appropriate relief on remand. At this time, it is even possible that any completed structure may be allowed to remain.

[3]The judgment of the Hawaii Supreme Court was not a final decision on any federal questions, *see* discussion at 8-9, *infra*, and hence is not within the categories of cases discussed in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

II. FEDERAL QUESTIONS NEVER PRESENTED TO THE STATE COURTS AND RAISED FOR THE FIRST TIME IN A MOTION FOR RECONSIDERATION ARE NOT SUBJECT TO REVIEW BY THIS COURT.

Aside from the absence of substantive merit to Petitioners' argument, a critical threshold requirement for review is that the questions first be presented to the state courts, 28 U.S.C.A. § 1257, "with fair precision and in due time." *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). Issues raised for the very first time in a motion for reconsideration are not subject to this Court's review. *Herndon* v. *Georgia*, 295 U.S. 441 (1935); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932).

Petitioners' attempt to argue constitutional issues for the first time in this extensive litigation before this Court borders on the absurd. As admitted by Petitioners, not a single alleged federal issue in their Petition was ever raised in the pleadings or briefs or in any oral argument in any Hawaii court (Petition at 14). Instead, they were raised only after the Supreme Court decision, by Motion for Reconsideration designed merely to construct an artificial basis for an attempt to take a petition to this Court.

Moreover, Petitioners fail to advance any reason for not anticipating a Fourteenth Amendment argument at any previous level if they believed it had merit. They can hardly claim that the Fourteenth Amendment is obscure and are unable to specify any factors that were not present throughout the litigation. Their claim of "constitutional issues" is an effort to obtain *de novo* review, and they should not be permitted to raise them for the first time after a decision of the highest state court. *See also*

Bailey v. *Anderson*, 326 U.S. 203 (1945) (arguments presented to state courts in terms of state law cannot later be shifted into federal questions). Otherwise litigants would be encouraged to reserve a federal argument for a last ditch effort in the Supreme Court after they had unsuccessfully litigated in state court. The Motion for Reconsideration was not a timely presentation of the questions, which are not now subject to review. *See Webb* v. *Webb*, 451 U.S. 493 (1981); *Hanson* v. *Denckla*, 357 U.S. 243 (1958).

III. THIS COURT WILL NOT REVIEW JUDGMENTS SUCH AS THIS THAT REST ON ADEQUATE NON-FEDERAL GROUNDS.

This court will not review state court judgments that rest on independent state grounds. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945). The decision of the state court here was predicated on analysis of both the local County Charter and the state's own law of vested rights and equitable estoppel (App. at A-10). Petitioners' real objection is to the state court's application of state law, which does not raise a federal question appropriate for review. *Agins* v. *City of Tiburon*, 447 U.S. 255, 259, n.6 (1980).

The Petition distorts considerably both the language and the fair meaning of the state court's decision. Petitioners accuse the Hawaii Supreme Court of equating "whether there was a constitutional taking within the meaning of the Fourteenth Amendment with whether there was 'estoppel' or 'vested rights' " (Petition at 18). However, the Hawaii Supreme Court never held nor implied that at all. The Court definitively based its holding on state law and in finding that the referendum was entitled to be

enforced stated: "This conclusion is based on a concept of 'vested rights', as that term is used in the charter" (App. at A-22). The state Supreme Court simply recognized that putting up structures in the hope that a court thereafter will hesitate in removing them undermines the state and local governments' orderly development permit process. The court noted in passing that its decision "is consistent with constitutional concepts underlying the vested rights doctrine" (App. at A-22). Petitioners now strain mightily to read into this line the notion that the court decided the case on federal grounds. This attempt to read a federal question into dicta does not alter the nature of the state court's decision. This Court has repeatedly insisted that it "reviews judgments, not statements in opinions . . ." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Because the decision rested on independent and entirely adequate state grounds, the Petition should be denied on that ground alone.

IV. PETITIONERS' ARGUMENTS REST ON NUMEROUS MISSTATEMENTS OF FACT, ASSERTIONS OUTSIDE THE RECORD AND ALLEGED FACTS CONTRARY TO FINDINGS OF THE STATE COURTS.

Graham's Petition is remarkable for the absence of citations to the decision of the Hawaii Supreme Court. *All* of Petitioners' claims are premised on factual determinations decided adversely to them in the lower courts, on misrepresentations, and on evidentiary assertions wholly outside the record. Their "taking" argument starts, for instance, from the premise that their investment was sufficient to establish a prospective property right. Petitioners advance wholly unsupported and wildly exaggerated

figures (Petition at 5, 21) and claim $4.3 million invested in the development (Petition at 20). There is absolutely no basis in the record to support these figures. Indeed, the state court found, based on the evidence presented by Petitioners, that many of the expenses incurred were revocable (App. at A-19, n.15) and that for some of the claimed expenses, there was no record of payment (App. at A-19, n.15).

Additional self-serving statements include the assertion that numerous condominium purchasers had invested in the project (Petition at 5, 11) and that substantial funds had been spent in building the hotel. *Id.* The Hawaii Supreme Court found as facts, however, that as of November 3, 1980, there were only four (4) sales contracts for the condominiums (App. at A-19, n.16) and that potential purchasers were warned about the referendum (App. at A-20). As of February 9, 1981, the date of the trial court's decision (and well *after* passage of the referendum), neither a construction contract nor a management agreement had been procured for the hotel. Equally important, in the four-day interval between obtaining the first of the valid building permits and the day of the referendum vote, Graham's single expenditure was the $24,907.50 building permit fee (App. at A-22) which is recoverable (App. at A-25). Any other expenditures were based on invalid building permits (App. at A-21) and were found to be "not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process" (App. at A-21).

Other critical misstatements are contained in Petitioners' strained attempt to establish that the Hawaii Supreme Court "badly misconstrued *Eastlake*" (Petition at 25). The state

court's reference in passing to *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) is at best a mere recitation of the general proposition that zoning referenda are compatible with due process. *See* App. at A-23. Moreover, this Court's concerns in *Eastlake* are simply not applicable to the instant case. First, this case presents the converse of the abstract question posed by Petitioners—that is, whether a referendum "freezes" land use. In this case, Graham raced forward " to undermine the referendum" (App. at A-21) and to procure permits instead of proceeding in an orderly process. Even after this race, any "sterilization" (Petition at 25) of Graham's land occurred for no more than four days, the time between the issuance of the first valid building permit and the date of the referendum. Second, the record is clear that the Nukolii site and all surrounding property were originally zoned agricultural (App. at A-5), and the state court found as a fact that the referendum restored the "compatibility" of the site with "the county zoning of bordering acreage, which prohibits resort development" (App. at A-23). Accordingly, Petitioners' factual claim that the referendum singled out its property (Petition at 22) without reference to a general comprehensive scheme, *id.*, is directly contrary to the findings of the court below.

Finally, Petitioners base their claim on the factual premise that they acquired an irrevocable right to commence construction on land which was zoned agricultural when acquired. But under state law, Graham had not established *any* of the four elements necessary to demonstrate a vested right in the inchoate development (App. at A-12 to A-22). Nor did it have the kind of "reasonable investment expectation," *see Agins* v. *City of Tib-*

uron, 447 U.S. 255 (1980); *Penn Central Trans. Co.* v. *N.Y. City*, 438 U.S. 104 (1978), cognizable as a possible basis for a taking claim. Such a question was never presented to the state courts. Indeed, to the extent that there is factual material on the question, it belies Petitioners' contentions. Upon careful review of the contracts, loan agreements, the permit decision and other evidence, the court held that the Developers' "expenditures and site preparation work constituted business risks. . . " (App. at A-24). Consequently, this Petition is an attempt to relitigate a case based upon rejected factual claims.

In *Penn Central, supra*, this Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development . . . " 439 U.S. at 130. The interest of Graham is much more attenuated than that in *Penn Central*. Here, the state court found, based on an analysis of the contracts and other documents, that Graham, a sophisticated and experienced investor, did not even actually believe that the site "was available for development", but merely hoped that it was and, proceeding in bad faith, undertook a business gamble. *See* App. at 15-16, -20, -24. Even if the issue had properly been presented to the state court and ruled upon by it, this falls far short of the kind of established development right this Court might wish to protect.

In conclusion, this Court does and should abstain from reviewing *de novo* state law issues in this case which are presented in the guise of "federal" questions, especially where those issues were dependent on numerous factual findings by the state court adverse to Petitioners.

V. THE QUESTIONS ARE NOT SUBSTANTIAL.

Aside from the failure to satisfy procedural requirements and the lack of substantive merit of Petitioners' arguments, both the factual and legal issues are unique to this case and are very likely never to arise again. For instance, the eleventh-hour obtaining of building permits, the act of proceeding to build after the referendum passed and after the case had been argued and submitted to the state Supreme Court will not likely be repeated. Moreover, the probability that the referendum will recur in similar circumstances is infinitessimal. The opinion below encourages development, but reaffirms to this investor that permits obtained by bad faith and without actual or reasonable reliance are unacceptable with all the implications that such conduct has for undermining confidence in local government and the orderly development process.

Petitioners' claim that the Hawaii decision "will be contagious" (Petition at 29, n.18) is unrealistic. Each state and the localities therein have their own permit mechanisms and property law which are inextricably intertwined with common law equitable estoppel rules and local development practices. States have therefore arrived at a variety of formulations in developing their own rules. The Kauai County Charter and the relevant referendum provisions therein are peculiar to that single island and have been clarified by the electorate only recently in the 1980 election. Although many equitable estoppel cases tend to be peculiar to the circumstances and facts therein, the instant case is especially so. The decision below was and is necessarily depen-

dent on the status of the state law on the subject, and local development practices and agency procedures as well as state and private documents such as those of the Hawaii Real Estate Commission and various local contracts.

Moreover, the Hawaii Supreme Court decision is hardly remarkable in the area of equitable estoppel, but constitutes a midpoint in the spectrum of positions taken by various jurisdictions (App. at A-13, n.8).

In the final analysis, Petitioners' discussion of abstract legal principles conveniently omits the facts of *this* case, which establish the total absence of any constitutional questions and limits its significance to the litigants in this case and the County of Kauai. In fact, Petitioner is now in the position of arguing that a developer who is not in good faith (App. at A-21); who engages in a "race of diligence to undermine the referendum process" (App. at A-21); whose reliance on "county approvals" would have been "unreasonable under the circumstances" (App. at A-20) and who in fact did not "reasonably rely on . . . actions of county officials" (App. at A-19); who "proceeded at risk" (App. at A-19) to make expenditures, much of which "must be disregarded outright as speculative" (App. at A-19, n.15); who obtained a building permit the day before the referendum (App. at A-21); who lost the referendum by a 2 to 1 margin of the populace (App. at A-6); who had not started construction or even signed a construction contract for the hotel and who had barely commenced the foundations of the condominiums at the time the referendum passed, has a constitutional claim even though neither that contention, nor any facts to support it, was raised or passed upon at any level at any time in state court.

CONCLUSION

For the foregoing reasons, Respondent moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of Hawaii.[1]

March 19, 1983

Respectfully submitted,

ROBERT L. GNAIZDA
SIDNEY M. WOLINSKY
ANITA P. ARRIOLA
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

ROBERT HARRIS
Harris & Smith

LINDA B. LEVY

Counsel for Appellee
Committee to Save Nukolii

---

[1]Given the heavy caseload of this Court, Petitioners' frivolous appeal, which misrepresents the facts and lacks numerous threshold procedural requirements as well as substantive merit, warrants an award of reasonable damages to Respondent under 28 U.S.C.A. § 2103.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this *Motion to Dismiss or Affirm* upon Appellant and Appellees pursuant to Supreme Court Rule 28 by placing three copies in the United States Mail with first class postage prepaid, addressed to:

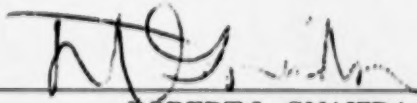
Leon Silverman
Sheldon Raab
Fried, Frank, Harris,
Shriver and Jacobson
1 New York Plaza
New York, NY 10004

Counsel for Appellants
Pacific Standard Life Ins. Co.,
Graham Beach Partners

Morris S. Shinsato
Michael K. Abe
County of Kauai
4396 Rice Street
Lihue, Kauai, Hawaii 96766

Counsel for Appellees
County of Kauai,
Mayor Eduardo Malapit

Done this 19th day of March, 1983 at San Francisco, California.



ROBERT L. GNAIZDA
Counsel for Appellee
Committee to Save Nukolii

No. 82-1477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and TONY T. KUNIMURA, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF HAWAII

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

LEON SILVERMAN, P.C.
One New York Plaza
New York, N.Y. 10004
(212) 820-8080
Counsel for Appellants
Pacific Standard Life
Insurance Company
and Graham Beach
Partners

FRED P. BOSSELMAN, P.C.
Ross & Hardies
WALTON D. Y. HONG
Masuoka & Hong
EDWARD A. JAFFE
Cades Schutte Fleming & Wright
SHELDON RAAB, P.C.
Fried, Frank, Harris, Shriver & Jacobson
FRANCIS A. WONG
Rice, Lee & Wong

Of Counsel

April 6, 1983

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 82-1477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and TONY T. KUNIMURA, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

APPELLANTS' REPLY TO MOTION TO DISMISS OR AFFIRM

The Committee to Save Nukolii (the "Committee") has filed a motion to dismiss or affirm. The Committee is the only party in this proceeding adverse to the appellants.[1] The County of Kauai and the Mayor have advised, by letter to the Clerk of this Court, that they support the position of the appellants on this appeal.[2]

[1] The listing required under Rule 28.1 of the Rules of this Court is set forth in the Jurisdictional Statement (hereinafter cited as "J.S.") at ii, and remains unchanged. Appellants have been advised that Tony T. Kunimura has succeeded Eduardo E. Malapit as Mayor and, accordingly, the caption of this case has thus been changed pursuant to Rule 40.3 of the Rules of this Court.

[2] The Developers have released any possible claims against the County for increased construction costs arising from the delay in completing the project during the period following the decision of the Hawaii Supreme Court, including the period required for review and consideration by this Court. The Developers also have covenanted not to sue the County for any of the prior events relating to the project if the County supports the Developers on this appeal and the Developers prevail and are permitted to complete the project.

The Attorney General of the State of Hawaii has filed a brief *amicus curiae* in support of the position of the appellants.

The Committee's brief in support of its motion to dismiss or affirm (hereinafter cited as "Br.") contains virtually no discussion of the merits of the constitutional questions raised on this appeal. Instead, the brief is devoted, almost entirely, to a discussion of what it calls "threshold" procedural requirements (Br. at 6), followed by an attempt to show that the questions presented are "unique" to the case at bar (Br. at 12). Even as to these points, the Committee's brief ignores the discussion of the very same matters in the Jurisdictional Statement and fails to distinguish or even discuss the controlling decisions of this Court cited in the Jurisdictional Statement.

ARGUMENT

I.

The barriers to review which have been asserted by the Committee all have been discussed previously in the Jurisdictional Statement. They are phantoms.

The Committee's claim that there has been no "final" judgment is inaccurate for the reasons set forth in the Jurisdictional Statement (J.S. at 2 n.2, 13–15). The decision being appealed from falls into at least two of the four categories of cases discussed in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). First, notwithstanding the remand to the State Circuit Court as to remedy, the federal constitutional questions on appeal here have been *conclusively* decided by the Hawaii Supreme Court. 420 U.S. at 479. Second, the federal constitutional issues, as decided by the Hawaii Supreme Court, will survive and require decision regardless of the outcome of the future State Circuit Court proceedings. 420 U.S. at 480. The Hawaii Supreme Court has ruled that "enforcement of the 1980 Referendum . . . does not offend . . . constitutional guarantees" and that "the Developers have no constitutional claim that

a taking has occurred" (J.S. at A–25).[3] It instructed the State Circuit Court to "enter summary judgment for [the Committee]", to "order revocation of the condominium and hotel building permits", and to "restrain any further construction on the Nukolii site" (*id.*). Where the highest court of a state has definitively determined the constitutional questions presented, its decision is reviewable by this Court, notwithstanding a remand for further proceedings—including "even entire trials", 420 U.S. at 479. Hence, the Committee's claim that any further state proceedings may be "extensive and evidentiary" (Br. at 5) is simply irrelevant in determining whether there has been a "final judgment" within the meaning of 28 U.S.C. § 1257.[4]

The Committee also states—as did the Developers (J.S. at 14)—that there was no briefing by any party on the federal constitutional questions prior to the Hawaii Supreme Court's decision (Br. at 6). What the Committee ignores is that the Hawaii Supreme Court in fact determined the federal constitutional issues. This removed any conceivable doubt as to this Court's jurisdiction (J.S. at 15). As this Court has stated:

> We now turn to the question of whether appellant's exhibition of the film was protected by the First and Fourteenth Amendments, a question which appellee asserts is not properly before us because appellant did not raise it on his state appeal. But whether or not appellant argued this constitutional issue below, it is clear that the Supreme Court of Georgia reached and

---

[3] *Compare San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), cited by the Committee (Br. at 4–5), in which the state court had *not* "decided whether any taking in fact had occurred." 450 U.S. at 633. Similarly, in *Grays Harbor Logging Co. v. Coats-Fordney Logging Co.*, 243 U.S. 251 (1917) (Br. at 4), there was no final judgment because the amount of "just compensation" for the condemned land remained to be determined, 243 U.S. at 256. By contrast, in the case at bar, since the Hawaii Supreme Court found that there was no "taking", there is simply no question of "just compensation" before the State Circuit Court; and, in any event, an action in "inverse condemnation" is not available in the Hawaii state courts (J.S. at 12 n.11).

[4] The Committee argues, disingenuously, that on remand "any completed structure may be allowed to remain" (Br. at 5 n.2). But that is a *non sequitur*, since the hotel stands *uncompleted*, with construction halted (J.S. at 11, 20–21).

decided it. That is sufficient under our practice. *Raley v. Ohio*, 360 U.S. 423, 436 (1959).

Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

Finally, the Committee makes the bizarre statement that the Hawaii Supreme Court rendered its federal constitutional holdings "in passing" (Br. at 8, 10). It is undenied that the Hawaii Supreme Court devoted the first sections of its decision to the construction of the referendum provisions involved and their application to the facts at bar. However, the court then went on to determine whether its construction of these provisions met federal constitutional requirements (J.S. at A–22–A–25). In that regard, the Hawaii Supreme Court expressly held that: (a) its construction and application of the 1980 Referendum and the referendum provisions of the Charter "satisfied constitutional requirements" (J.S. at A–23); (b) the result reached comports with the Fifth and Fourteenth Amendments, citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (J.S. at A–25); (c) "zoning by referendum is compatible with due process", citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) (J.S. at A–23);[5] and (d) "the Developers have no constitutional claim that a taking has occurred" (J.S. at A–25). (*See also* J.S. at 14). The Committee's refusal to discuss these holdings is telling and simply underscores the undoubted jurisdiction of this Court to review the judgment of the Hawaii Supreme Court.

II.

The Committee devotes the remainder of its brief to arguing that the case involves "factual" matters and "unique issues". Again, the Committee fails to come to grips with what the facts are[6] and what the Hawaii Supreme Court did.

---

[5] *Eastlake* is also cited by the Hawaii Supreme Court in two other places (J.S. at A-8, A-14).

[6] Space does not permit a refutation of all of the Committee's misstatements of fact. Among the most egregious of these are: (a) the Committee states that it obtained certification "immediately" after the Developers' property was zoned for resort use (Br. at 2), whereas certification in fact occurred on January 30, 1980 (J.S. at 8, A-5, A-82), almost a year to the day after the February 2, 1979 zoning

A graphic example concerns the discussion of the condominium building permit, which in fact was issued on August 5, 1980—three months (J.S. at 8, A–6), not four days (Br. at 3), prior to the general election. The Hawaii Supreme Court found that, although the building permit was issued in August, it was predicated upon an approval from the State's Health Department which, although obtained, would have been revoked if the Developers had not proposed a plan for an alternative sewage disposal site—which the Developers did and which plan was finally approved on October 31, 1980—before the general election (J.S. at A–21 n.19). Certainly, there can be no question on these facts as to the Developers' reliance on the various permits obtained; and even the Committee must concede that the entire issue was moot by the time of the Referendum.

Likewise, the Committee's claim that the Developers have used "wildly exaggerated figures" is belied by the record—the $4.3 million in expenditures prior to the 1980 general election are all documented in the record before the Hawaii Supreme Court and are explained in the Jurisdictional Statement (J.S. at 11; *see also id.* n.9).

The Committee proffers additional purported "findings" by the Hawaii Supreme Court, none of which justifies the decision below. Thus, that the Nukolii site may border land that is not zoned "resort" (Br. at 10) is hardly "unique" to the Developers' property and is not a justification for the result reached. Irrespective of the asserted rationality of the "rezoning", there has been a taking in the constitutional sense because the Developers simply had gone

---

(J.S. at 7, A-5, A-83-A-86); (b) the Committee states that the Developers "misrepresent[ed]" the sewage system to be used (Br. at 3), whereas the Hawaii Supreme Court found that the Developers "candidly" stated that their initial submission was proposed "on an interim basis" (A-21 n.18); (c) the Committee states that at the time of the Referendum "no work at all had begun" on the hotel (Br. at 3, 13), whereas by then the entire site—including the hotel—had been cleared, grubbed and graded (J.S. at 11), and the Developers had completed numerous improvements connected with the *entire* project (J.S. at 11-12); and (d) the Committee states that the "Kauai County Charter and the relevant referenda provisions therein are peculiar to that single island" (Br. at 12), whereas exactly the opposite is true, both within the State of Hawaii (Brief of State of Hawaii, at 7) and elsewhere (J.S. at 29 n.18).

too far to be "rezoned" out of their project and were deprived of their "distinct investment-backed expectations". *Kaiser Aetna v. United States*, 444 U.S. 164, 179–180 (1979); *Penn Central, supra.* And—with respect to the issue that does concern the selective nature of the restriction imposed—what is critical is not the treatment of bordering areas, but that the 1980 Referendum effected a down-zoning for one single spot in a clear deviation from Kauai's—and Hawaii's—comprehensive land-use planning scheme (J.S. at 7, 28–29).

The Committee's statement that the Developers' conduct undermined the "orderly development permit process" (Br. at 8) is untrue. Prior to the certification of the Referendum petition, the Developers had an undisputed right to take the various steps necessary to use their property as zoned. The Developers' expenditures began well prior to certification of the Referendum petition (J.S. at 11 n.9). After certification, each of the government officials concerned and the State Circuit Court, in all of its decisions, not only permitted the Developers to continue to obtain the necessary approvals and permits for such development—which they did (J.S. at 9–10, A–32–A–68)—but also construed Section 5.11 of the Charter as protecting these expenditures regardless of the result of the Referendum vote. Even the Hawaii Supreme Court, while giving the Referendum retroactive effect, did not deny that the Developers had a right to proceed as they did. To state that the Developers engaged in a "race" undeserving of constitutional protections (Br. at 4, 13) is not to state a question of "fact"; it is the assertion, in rhetorical terms, of an erroneous principle of constitutional law. Indeed, the Committee's argument that the Developers engaged in a "race" can be applied to any developer who does not consent to halt activity while an anti-development group conducts a referendum. In other words, the argument assumes the conclusions that: (a) the Developers' expenditures before certification are unworthy of constitutional protection, (b) after certification, the Developers' activities lose constitutional protection because the Developers should have anticipated the "freeze" retroactively imposed by the Hawaii Supreme Court's decision, and (c) that "freeze" itself is constitutional.

It is not disputed that the Hawaii Supreme Court determined that the Developers "proceeded at risk" after certification (J.S. at

A–19) and that their substantial expenditures in that period were "speculative" (J.S. at A–20–A–21). However, the Developers proceeded "at risk" only because the Hawaii Supreme Court held—retroactively and in acknowledged rejection of the literal statutory language—that the Developers' expectations for use of their property could not be taken into account once the 1980 Referendum petition was certified as having been signed by the requisite number of voters, *i.e.*, twenty percent of those eligible to vote at the 1978 general election (J.S. at 21–22, A–24). Whether the Developers' property use can be put "at risk" in the circumstances presented is a central part of the decision of the Hawaii Supreme Court which is called into question on this appeal.

III.

The Committee predicts that the issues in this case "are very likely never to arise again" (Br. at 12). But dispassionate observers, including the State of Hawaii, entertain an entirely contrary view, setting forth effects which have already become both widespread and pernicious. The reason is evident. If the decision below is left to stand, any referendum mechanism can be misused in the same way as in the case at bar. Apart from the spate of constitutional issues which are likely to arise, the ultimate effect can only be to stop legitimate development before it begins.

IV.

A party which argues that there can be no "taking" because, at the time of the Referendum, the Developers "had barely commenced the foundations of the condominiums" (Br. at 13),[7] has not paused to understand *Kaiser Aetna v. United States*, *supra*, or the other applicable decisions of this Court (J.S. at 18–20).

In view of the remarkable result reached by the Hawaii Supreme Court, the clear conflict with applicable decisions of this Court,

[7] In fact, development had progressed substantially beyond that point (J.S. at 11).

the fact that both the County of Kauai and the State of Hawaii also urge reversal of the decision below, and the Committee's evident inability to justify (or even discuss) that decision in light of prior precedent, we respectfully urge that summary reversal is warranted.

CONCLUSION

For the reasons set forth in this Reply Brief and in the Jurisdictional Statement, appellee Committee's motion to dismiss or affirm should be denied. We respectfully request this Court to note probable jurisdiction of this appeal or, alternatively, to grant certiorari. In view of the clear conflict presented with prior decisions of this Court and the absence of justification by any party for the decision below on the merits of the constitutional questions presented, the Court should consider summary reversal in lieu of plenary briefing and argument.

April 6, 1983

Respectfully submitted,

Leon Silverman, P.C.
One New York Plaza
New York, New York 10004
(212) 820-8080

Counsel for Appellants
Pacific Standard Life Insurance Company and Graham Beach Partners

Fred P. Bosselman, P.C.
Ross & Hardies
One IBM Plaza
Chicago, Illinois 60611
(313) 467-9300

Walton D. Y. Hong
Masuoka & Hong
P.O. Box 1727
Lihue, Hawaii 96766
(808) 245-4757

Edward A. Jaffe
Cades Schutte Fleming & Wright
1000 Bishop Street
P.O. Box 939
Honolulu, Hawaii 96808
(808) 521-9200

Sheldon Raab, P.C.
Fried, Frank, Harris, Shriver & Jacobson
(A partnership which includes professional corporations)
One New York Plaza
New York, New York 10004
(212) 820-8090

Francis A. Wong
Rice, Lee & Wong
345 Queen Street
Honolulu, Hawaii 96813
(808) 536-4421
Of Counsel

No. 82-1477

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,
Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,
Appellees,

BRIEF OF THE STATE OF HAWAII *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

TANY S. HONG
Attorney General of Hawaii
JAMES H. DANNENBERG
Deputy Attorney General of Hawaii
(Counsel of Record)
Department of The Attorney General
Hawaii State Capitol
Honolulu, Hawaii 96813
(808) 548-4740
Attorneys for Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1477

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

v.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees,

BRIEF OF THE STATE OF HAWAII *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICUS CURIAE

The State of Hawaii, by Tany S. Hong, Attorney General, and James H. Dannenberg, Deputy Attorney General, submits this amicus curiae brief in support of the Appellants in the above-entitled cause, pursuant to Rule 36.4 of the Rules of the Supreme Court.

This case raises important constitutional issues arising out of the retroactive downzoning of a particular piece of property through a referendum. It also raises important questions of public policy since it is axiomatic that the restrictions on private property rights profoundly affect the nature and quality of the economic life of the State. To the extent that land use decisions unnecessarily impair

the rights of individual owners, the state economy may be adversely affected.

Because the general interests of the people of the State of Hawaii are at stake in the resolution of issues before this Court, your amicus believes that it has a substantial interest in the ultimate decision. For that reason, your amicus respectfully urges that the Court note probable jurisdiction, or, in the alternative, that it grant the Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Retroactive downzoning by referendum of a single parcel under the circumstances of this case is both unconstitutional and violative of the principles of rational land use planning; in addition, the approval of such retroactive downzoning by the Hawaii Supreme Court poses a significant threat to the economy of the State of Hawaii in that potential investors will be unable to predict the extent to which legislative and executive approvals of development will withstand subsequent referenda directed at those particular developments.

ARGUMENT

I. Appellants' Constitutional Rights Under The Due Process And The Taking Clauses Were Violated By The Retroactive Downzoning Of Their Property.

Your amicus has carefully read and endorses the analysis of both the facts and constitutional issues contained in Appellants' Jurisdictional Statement. At the same time, however, the Hawaii Supreme Court's reliance on this Court's decision in *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) merits additional discussion.

The concept of zoning by referendum has been controversial in both law and land use planning. *See, e.g.* D. Callies. "The Supreme Court is Wrong About Referendum Zoning," 42 *Planning* 4 (Dec. 1976), Williams; *Am. Land Plan.* § 26.10 (Supp. 1982); and G. Goulder, "Referendum Zoning: *City of Eastlake* v. *Forest City Enterprises, Inc.*" 14 *Urban Law Annual* 319 (1977). While this Court has allowed the use of zoning by referendum it has also noted the potential for abuse of constitutional rights.

The Hawaii Supreme Court purports to adopt the *Eastlake* view in *Kauai* v. *Pacific Standard Life Insurance Co. et al.* (Slip Op. 8267, October 14, 1982), (hereinafter "Nukolii") but it does so with a curious selectivity. While referendum zoning is hailed as "a basic instrument of democratic government" Slip Op. at 8, citing *Eastlake* at 679, the Hawaii court apparently ignored the factual distinctions between the cases as well as the important warnings in the majority opinion about the possible unconstitutional uses and results of a referendum zoning system.

Eastlake is perhaps most clearly distinguishable because *all* zoning changes in that case had to be put to the electorate. It was not a case, as we face here, of an individual parcel being singled out for adverse action. A second important point is that the referendum in *Eastlake* had to be held within a very short period of time. Under the Hawaii ruling it could be delayed as much as two years.

It is important to note that the majority opinion in *Eastlake* specifically said that it did not face the precise question raised in the Nukolii case, for in *Eastlake* the property owner sought to upgrade zoning:

> The situation presented in this case is not one of a zoning action denigrating the use or depreciating the

> value of land; instead, it involves an effort [by the property owner] to *change* a reasonable zoning restriction. No existing rights are being impaired; new use rights are being sought from the City Council.

426 U.S. at 680, n. 13 (Emphasis in original.)

II. The State's Interests Are Impaired By The Hawaii Supreme Court's Decision.

Traditionally, Hawaii has been a capital short State which relies heavily upon the infusion of capital from other areas of the world. Investors found Hawaii to be an attractive investment because of our controlled growth and a stable economy. For example, out of 56,502 hotel rooms in the state as of July, 1981, 10,333 (or 18.3 percent) were foreign owned; in addition, Hawaii ranks second among the states in percentage of foreign owned agricultural land. *State of Hawaii Data Book* pp. 559-568. These same investors now are unable to rely upon the clear and unambiguous language of any statute since the Supreme Court has rendered meaningless the zoning decisions of local legislative bodies, as well as the statutes dealing with zoning referenda. Effectively, the meaning of any such statute may be placed in doubt.

The specific effect of the decision is to abort in midstream construction on a single parcel of property which had commenced after valid building permits and other governmental approvals had been properly obtained (and condominium sales had been made and closed). The Hawaii Supreme Court determined that once a referendum petition was certified—here, by 20% of Kauai's 1978 eligible voters—all land use could be frozen; a landowner could only proceed at its peril in developing its land for the use for which it was zoned, even though the zoning on their parcel had not actually been changed but only *might* change. The impact of this decision goes beyond the De-

velopers' $48 million investment; your amicus believes it will have a chilling effect on all future investment in Hawaii with accompanying adverse consequences on Hawaii's economy and an adverse impact on numerous state laws and policies.

Land-use policy and planning is comprehensively codified in Hawaii on both the state and local levels. *See, e.g.*, Hawaii Rev. Stat. ch. 205, 205A and 226. There are three distinct levels of planning and zoning. The first is the State Land Use Commission classification; the second is the County General Plan, and the third is specific County zoning. The state scheme of land-use regulation essentially provides for land-use designation on the state and local level, each to be consistent with the other. Specifically, the County General Plans must be consistent with and conform to the State Land Use classification. The specific County zoning, in turn, must be consistent with and conform to the County General Plan. As noted, prior to commencement of construction, the Developers were required to obtain approvals and consents from numerous state and local agencies. For the Developers, this was a more than two-year process which began as early as May, 1978 (when the Developers applied for zoning of the Nukolii site as "Resort District RR-20"), and culminated on November 3, 1980 (when the hotel building permit, which had been applied for three months earlier, was issued).

The impact of the Supreme Court's decision has already been felt. In the very few months that have elapsed since the decision was announced, major lending institutions have altered their lending policies to secure themselves against what they regard as a threat to the stability of their investment in the State. The new policies require developers to provide collateral totally independent of

the planned project to secure the construction loan. Only the largest developers can comply and then only at significant additional cost. The smaller developers, many of whom were born and raised in Hawaii, will be unable to post the newly-required additional collateral. They will therefore be unable to acquire construction financing, and, as a result, will be forced out of the local development business.

The reasons for the lenders' new policy is evident. In the past, based in part on earlier Supreme Court decisions, vesting of rights to zoning could be ascertained with relative certainty. However, as a result of this decision, a developer cannot be certain that his rights to the zoning of his property have vested. In a condominium project, for example, a developer could secure all required approvals and permits, begin construction and sell the project, only to find that vesting has not occurred. Thus, his lender could find itself in a situation where funds have been advanced in reliance upon the security of a viable project, and because of a retroactive down zoning now sanctioned by the Supreme Court, will no longer have adequate security for its loan.

Likewise, potential future developers looking at Hawaii for investment may not be willing to invest the time, effort and money to obtain the complicated layers of required permits. As has become evident, the interjection of *ad hoc* rezoning by referendum into the permit process is a substantial deterrent to future investment in Hawaii. The result of all this can only exacerbate the depressed state of Hawaii's tourism and construction industries, as well as the level of unemployment on Kauai specifically and in the State of Hawaii generally.

Even if a contemplated use of land is not subject to this prolonged permit process, any landowner may still be

stopped in its tracks in developing its land by the simple means of a minority of voters signing a petition to rezone the owner's—and only the owner's—parcel. The uncertainty and unsettling effects from such an arbitrary and capricious deprivation of land-use can only undermine development in Hawaii. This is a real possibility since the counties of Hawaii and Maui also have charters with referendum and/or initiative provisions applicable to zoning ordinances. Hawaii Charter, § 11; Maui Charter, § 11. The Hawaii Supreme Court decision has a direct impact on those provisions. Out-of-state investors can only assume that this highly publicized decision will apply statewide to the other counties as well. Indeed, on Oahu, developers are now being advised by Honolulu's corporation counsel that the recently amended Honolulu County Charter also permits legislation by initiative that would revoke existing zoning, even though Honolulu's charter does not expressly contain a referendum provision. Honolulu Charter, § 3.

III. The Decision Of The Hawaii Supreme Court Conflicts With State Goals And Policies.

The impact on Hawaii's economy is compounded by the fact that the decision invalidates state law and policy expressed by the Hawaii legislature.

In enacting, for example, the Hawaii State Planning Act of 1978, Hawaii Rev. Stat. ch. 226 (1982 Supp.) ("Hawaii State Plan"), the Hawaii legislature found, among other things, that: ". . . there is a need . . . to improve coordination among different agencies and levels of government, to provide for the wise use of Hawaii's resources and to guide the future development of the State." Hawaii Rev. Stat. § 226-1.

The *ad hoc*, selective and particularized rezoning, aimed only at a specific parcel of land, effected by the referendum and condoned by the Hawaii Supreme Court is the very antithesis of a comprehensive scheme of land-use planning and is wholly contrary to the goals and objectives of state-wide coordinated land-use planning enacted by the Hawaii legislature. Indeed, the rezoning violated not only the Hawaii Revised Statutes but the Kauai County Charter, both of which mandate that zoning ordinances must be consistent with the County General Plan, Charter, § 14.10; Hawaii Rev. Stat. § 46-4.

The economic impact of the decision is also contrary to the economic objectives of the Hawaii State Plan, which include, among other things, promotion of Hawaii as an "attractive market for investment," achievement of a "sustained level of construction activity," and encouragement of businesses that have "favorable financial multiplier effects" on the Hawaiian economy. Hawaii Rev. Stat. § 226-8(b) (2), (6), (14). See also Hawaii Rev. Stat. § 226-8(a), which states that state planning should be "directed towards achievement" of a "visitor industry" as a "major component of steady growth for Hawaii's economy." These planning goals and objectives were ignored and, indeed, jeopardized by the decision.

The failure of the Hawaii Supreme Court to discuss or deal with the economic objectives set forth above tipped the balance entirely against development in this State. In the permit application process complied with by the Developers, precisely such a balancing between the benefits of development and the need for open space use was done by the numerous state and local agencies and elected officials involved and was resolved in favor of development at Nukolii. Indeed, the Special Management Area ("SMA") permit process set out in Hawaii Revised Stat-

utes Chapter 205A was exactly the forum for weighing the benefits of the project against its impact on the scenic assets of the State, and in that forum the project was found to be consistent with State and County objectives. The effect of the decision is to disregard the judgment of such officials charged with the responsibility for a coordinated scheme of land-use planning mandated by the Hawaii legislature.

Much land use and economic planning are focused on the tourist industry. This is a vital part of Hawaii's economy which provided in 1981 $446 million in tax revenues and accounted for 32.5% of the civilian workforce. *State Data Book*, pp. 184, 273. Hawaii is seeking not simply to continue to develop the tourist industry but as it is, to direct it away from Oahu to the other islands—such as Kauai. This is intended to serve two functions: first, by reducing the concentration of visitor activity it is believed that some of its negative effects can be mitigated. The second, and most important function, is to provide more jobs on the other islands.

Governor Ariyoshi has summarized the social dilemma very well:

> We need to discourage the continued concentration of population on Oahu by providing the right kinds of housing, jobs and economy for our Neighbor Islanders and their offspring. . . . What I am talking about is the opportunity for a person who grows up on the Neighbor Islands to begin to feel that they have a right and they have a chance to live on the Neighbor Islands. It hurts me very much when I hear a young person saying that they are moving to Honolulu, or have moved to Oahu, not because they wanted to but because they felt there were no job opportunities on each of the Neighbor Islands. This is what we are talking about when we speak of the equal opportunities that we now have for education,

> health services, social services, and we ought to have for employment opportunities also.

State of the State Address, 9th Leg., *Senate Journal* 46 (January 25, 1977)

IV. The Decision Of The Hawaii Supreme Court Amounts To Retroactive Application Of The 1980 Referendum.

Because the downzoning of the Nukolii site was effected by referendum, the Hawaii Supreme Court viewed the case presented as "one of first impression" that involved "a conflict between the private interest of the landowners" and "the public interest of the electorate to effectively determine what the land use policy shall be." However, by the time of the referendum, government consents had been given, building permits had already been issued, and construction had already begun on the Nukolii site. Precisely to mitigate the possible retroactive effects of a referendum, Section 5.11 of the Charter provided that the referendum process could not affect any "vested rights" or "any action taken or expenditure made up to the date of the referendum." Thus, the Developers, proceeded in reliance upon and in conformity with this provision, as well as the foregoing approvals and permits given by State and local officials and the above-described decisions of the County Council, the County Attorney and the Fifth Circuit. The literal and plain meaning of the "grandfather clause" contained in Section 5.11 is consistent with State law in this regard, which also precludes retroactive effect on any repeal or enactment of a State law. *See* Hawaii Rev. Stat. §§ 1-3, 1-19. In order to halt development on the Nukolii site, the Hawaii Supreme Court had to "reject the literal interpretation" of Section 5.11 of the Charter. Slip Op. at 10. However, the Court's refusal to adopt such a "literal" interpretation of Section 5.11 has created the situation whereby not only the De-

velopers' $48 million investment is jeopardized, but has also cast substantial doubt as to future investment in Hawaii.

V. The Decision Of The Hawaii Supreme Court Diminishes The Level Of Predictability In Law Necessary To Facilitate Economic Decision Making

Regardless of the economic impact on the State of Hawaii, however, this Court should reverse the Hawaii Supreme Court because its decision casts doubt on the predictability of the legal system as it impacts upon the marketplace.

To the extent that Western legal systems have distinguished themselves from other systems of social and economic control, it is on the basis of what Max Weber called "formal rationality:" decisionmaking based upon articulable principles derived from characteristically "legal" tradition. *See e.g.*, Rheinstein, *Max Weber on Law in Economy and Society* (1954). More important, these legal principles have historically given rise to a high degree of predictability of outcomes in Western law. If stability exists in any measure in our institutions, it is in part because our legal system provides a reliable and relatively predictable forum in which disputes may be resolved. If, for example, potential investors are forced to "guess" the meaning of otherwise unambiguous statutes drafted to protect their vested interests, fewer persons will be willing to make investments over a period of time.

This is precisely the message of the Nukolii decision. The developers obtained all required permits, invested considerable capital, and obtained favorable decisions from the Kauai County Council, the Kauai Corporation Counsel, and the Circuit Court. Nevertheless, the Hawaii Supreme Court chose to overturn these decisions

and rule retroactively that no rights had vested. It would have been difficult to predict such a result, and it is because of this unsettling effect that your amicus supports the position of Appellants.

CONCLUSION

For the foregoing reasons, your amicus, the State of Hawaii, respectfully urges that this Court note probable jurisdiction or, in the alternative, grant the Petition for Writ of Certiorari.

Respectfully submitted,

TANY S. HONG
Attorney General State of Hawaii
JAMES H. DANNENBERG
Deputy Attorney General
(Counsel of Record)
Hawaii State Capitol
Honolulu, Hawaii 96813
Telephone No. (808) 548-4740
Attorneys for Amicus Curiae

DATED: Honolulu, Hawaii, April 4, 1983

No. 82-1477

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY, *et al.*,
Appellants

v.

COMMITTEE TO SAVE NUKOLII, *et al.*,
Appellees

On Appeal From The Supreme Court Of Hawaii

NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY ASSOCIATION OF HAWAII, MAUI CONTRACTORS ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF IN SUPPORT OF THE JURISDICTIONAL STATEMENT

ANN REINES KAHN
NANCY H. LIEBERMANN
National Housing Center
Washington, D.C.

EDWARD J. SACK
International Council of Shopping Centers
New York City
Of Counsel

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359
Counsel for Amici

April 1983

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1477

PACIFIC STANDARD LIFE INSURANCE COMPANY, *et al.*,
Appellants

v.

COMMITTEE TO SAVE NUKOLII, *et al.*,
Appellees

On Appeal From The Supreme Court Of Hawaii

MOTION OF THE NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY ASSOCIATION OF HAWAII, MAUI CONTRACTORS ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The above-named trade associations respectfully move this Court for leave to file the accompanying brief *amici curiae* in support of appellants.

The Associations have received written consent from appellants and from appellees County of Kauai and the Mayor of the County to file the brief and have filed the letters of consent with the Clerk of the Court. Appellee Committee has declined to grant consent.

The National Association of Home Builders represents approximately 105,000 builder and associate members

organized in 750 affiliated state and local associations in the fifty states, District of Columbia and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial builders, as well as remodelers and land developers. NAHB members construct 75 percent of all housing in the United States; residential construction, a $150 to $200 billion industry, employs 3.5 million people. The Building Industry Association of Hawaii has approximately 425 members that produce about 80 percent of the state's housing. The affiliated Maui Contractors Association has about 325 members, producing over 90 percent of Maui's housing. We are the voice of the American and Hawaiian shelter industry.

The International Council of Shopping Centers, Inc. is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 10,000 members, and the approximately 8,500 located in the United States represent a majority of the shopping centers in this country. The ICSC is the only United States trade association specific to shopping centers.

The Associations sincerely believe that the accompanying brief will greatly assist the Court because our concerns are broader than those of appellants, which focus their arguments on the Hawaii situation and the circumstances of their case, important as it is. The brief addresses public policy and development issues not addressed by appellants, and it relates those issues—concerning the

legal status and practical role of the "vested rights" doctrine in the United States, the national impact of zoning referenda on housing and the significance of the comprehensive land planning system—to the Constitution's due process and just compensation clauses.

The Associations have a fervent interest in maintaining reasonable certainty and fundamental fairness in the land development process, particularly where the process is long in time and complex in the nature and frequency of governmental approvals required, as is the case both in this appeal and frequently throughout the nation. Where that reasonable certainty is erased at the very end of the development process by a discretionary referendum, after construction has begun and millions of dollars have been expended based on good faith reliance on years of governmental approvals, basic constitutional rights are also erased, placing in jeopardy real estate development in those many states that have the referendum process.

If builders and developers cannot depend on a rational, comprehensive, nationally recognized land use system, one in which government works in concert with the developer to assure that all public plans, laws and requirements are met every step of the way, then the public policy in support of good and fair land use planning will be stood on its head. For not only will privately held investment-backed expectations be destroyed but also the public need for sensible predictability in the planning process. Unpredictability greatly impedes anyone from taking the expensive chance of initiating a building project and makes the providing of housing, especially multifamily or lower cost housing, which can be controversial even if legal, that much more difficult to achieve.

Our vital concerns and differing perspective regarding the constitutional protection to be accorded vested rights

are akin to the issues raised by the National Association of Home Builders in *amici* briefs filed in the zoning cases of *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621 (1981), *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) and *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). If vested or constitutional rights in governmentally-sanctioned developments are always to be at the capricious mercy of discretionary, plebiscitary revocation procedures no matter how late it is in the development process and regardless of the depth of prior commitments, then the ability of the housing industry to assist the nation in meeting its critical housing needs will be further hindered.

For the above reasons, this Motion should be granted.

Respectfully submitted,

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359
Counsel for Amici

ANN REINES KAHN
NANCY H. LIEBERMANN
National Housing Center
Washington, D.C.

EDWARD J. SACK
International Council of Shopping Centers
665 Fifth Avenue
New York, N.Y. 10022
Of Counsel

April 1983

QUESTION PRESENTED

Whether a state court can apply the result of a rezoning referendum to a specifically targeted, governmentally approved, ongoing building project, thereby revoking previously issued building permits, depriving the property owners of the right to complete their construction and effectively taking for public use their vested rights in the development, without violating the Constitution's Due Process and Just Compensation Clauses and Supreme Court rulings thereunder.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

Table of Authorities Continued

Table of Authorities Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1477

PACIFIC STANDARD LIFE INSURANCE COMPANY, *et al.*,
Appellants

v.

COMMITTEE TO SAVE NUKOLII, *et al.*,
Appellees

On Appeal From The Supreme Court Of Hawaii

NATIONAL ASSOCIATION OF HOME BUILDERS, BUILDING INDUSTRY ASSOCIATION OF HAWAII, MAUI CONTRACTORS ASSOCIATION, INTERNATIONAL COUNCIL OF SHOPPING CENTERS BRIEF *AMICI CURIAE* IN SUPPORT OF THE JURISDICTIONAL STATEMENT

INTEREST OF AMICI

The interest of *amici curiae* is set forth in the preceding motion for leave to file this brief.

CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part: "No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."

The fourteenth amendment to the Constitution provides in pertinent part: "No State shall . . . deprive any person of . . . property, without due process of law. . . ."

A SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

This appeal is made necessary by a remarkable zoning opinion that does great violence to the Constitution and the public policy considerations raised below. Fundamental fairness in the use of land, a value of equity given meaning in the due process and just compensation clauses of the fifth and fourteenth amendments, has worth only so far as people can reasonably rely on official development approvals and the integrity of a state's comprehensive land use system. The court below, in a shockingly severe ruling with broad ramifications, has misconstrued and misapplied this Court's zoning and land use decisions to such a degree that repeated governmental approvals and a reasonably dependable land use system have been effectively reduced to constitutional tatters.

One thing this appeal is *not* is a challenge to the principle of *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)—that submitting rezoning applications to mandatory referenda does not violate the fourteenth amendment due process clause. Nor is this a case of development speculation in which someone assumed a business risk and lost fairly. As explained below, this case is very much unlike *Eastlake* because, here, among other salient differences, existing rights *are* being impaired, raising the just compensation issue as well. 426 U.S. at 679 n.13. This case is to *Eastlake* what *Nectow* v. *City of Cambridge*, 277 U.S. 183 (1928) (zoning ordinance as applied violates due process) is to *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (zoning on its face comports with due process), what *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (housing ordinance defini-

tion of "family" violates due process) is to *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (zoning ordinance definition of "family" not unconstitutional), and what *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61 (1981) (zoning exclusion of live, adult entertainment violates first amendment) is to *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (zoning regulation of adult theatres comports with first amendment).

I. Vested Rights And The Constitution

The concept of "vested rights" in the American land development process is analogous to the *res judicata* doctrine in our legal system. Both policies recognize the practical and equitable necessity for a finality of official, substantive decisions at the end of thorough, frequently complex, procedures.

Courts have long recognized the need to shield developers from changes in regulations governing the development process that would unfairly impede ongoing projects, resulting in wasted resources and unacceptably high risks for the development community, by invoking the doctrines of vested rights and equitable estoppel to bar application of the new regulations. The estoppel doctrine reflects equitable considerations, while the doctrine of vested rights has its origins in the constitutional realm. D. Mandelker, Land Use Law § 6.12 (1982); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-65. One noted commentator on vested rights has elucidated the distinction between the two intertwining doctrines as follows: "Estoppel focuses upon whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation." Hee-

ter, *supra* at 65; *see Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979). In a sense, then, vested rights is a noun while equitable estoppel is its verb. The former has little life without the latter.

> Why is the issue so critical now? One reason is that in the past decade or two, building projects have become larger, of longer duration, and more complex. The multiphase project extending over several years of construction is more exposed to alterations in public policy, while at the same time it requires more flexibility to cope with market changes. Also, it seems to be a fact of life that land use regulations are changing more often and more drastically than ever before. In this era of increasing sensitivity to environmental, design, conservation, and other concerns, there are growing pressures to regulate development more closely. In some jurisdictions, slowing or halting growth has become a topic of strong interest. These pressures have led in the past 10 years to more rapid changes in regulation and more restrictive regulations. With every change in plans, zoning boundaries, or land development regulations comes the probability of injury to property holders who expect to develop their properties according to the regulations which were in effect when they made their investments. C. Siemon, W. Larsen & D. Porter, Vested Rights: Balancing Public and Private Development Expectations 3 (Urban Land Institute 1982) (hereinafter cited as Urban Land Institute).

The potential for eventually securing vested property rights, protected ultimately by the due process clause and given expression by the equitable estoppel principle, helps overcome a landowner's natural reluctance to undertake development in an uncertain regulatory climate by giving him the assurance that regulatory changes occurring late in the game will not critically impair his substantial investment in a project. The crucial value of the vested rights doctrine in eliminating unnecessarily

arbitrary risks and interjecting a degree of certainty into the development process cannot be overstated. *See, e.g.*, Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L.J. 623 (1978); Hagman, *The Vesting Issue: The Rights of Fetal Development Vis a Vis the Abortions of Public Whimsy*, 7 Envt'l L. 519 (1977); Heeter, *supra*. *See also* American Law Institute, Model Land Development Code § 2-309 (1976) (codifying the vested rights rule). Generally, in order to accrue vested rights, a developer must have made substantial expenditures or otherwise committed himself to his substantial disadvantage in good faith reliance on some act of the government prior to the regulatory change. *See, e.g.*, R. Ellickson & A. Tarlock, Land-Use Controls 203-04 (1981); D. Mandelker, *supra* at ch. 6; Urban Land Institute, *supra* at 13; Delaney & Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 St. Louis U.L.J. 219, 221 (1979).

The test, then, is fundamentally one of gauging whether development expectations have matured to the point of constituting constitutionally protected rights. *See* Urban Land Institute, *supra*. Affirmation of the constitutional stature of vested rights appears early in American law. In *Dainese* v. *Cooke*, 91 U.S. 580 (1875), a case whose facts and appellate posture are a nineteenth century version of the facts and posture of this appeal, this Court struck down a court order enjoining two builders from performing further work on their partially completed buildings and requiring removal of the structures because the Supreme Court could discern no clear threat to the public health, safety or general welfare. The opinion signals this Court's refusal to countenance the deprivation of investment-backed development expectations without due process absent compelling public ne-

cessity. And, of course, a substantial destruction of "investment-backed expectations," as we have here, readily becomes a *de facto* taking of private property for a public purpose, giving rise to the claim under the just compensation clause. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171, 3174-75 (1982); *San Diego Gas & Electric Co.* v. *City of San Diego*, 450 U.S. 621, 648 (1981) (Brennan, J., dissenting opinion); *Agins* v. *City of Tiburon*, 447 U.S. 255, 262 (1980); *Kaiser Aetna*, *supra* at 175; *Penn Central Transportation Co.* v. *City of N.Y.*, 438 U.S. 104, 124, 127-28 (1978).

The constitutional basis of vested rights has been noted in modern cases as well. *See, e.g., Aries Development Co.* v. *California Coastal Zone Conservation Commission*, 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315, 325 (1975); *Reichenbach* v. *Windward at Southampton*, 80 Misc. 2d 1031, 364 N.Y.S.2d 283, 291 (Sup. Ct.), *aff'd*, 372 N.Y.S.2d 985 (App. 1975). In particular, the Hawaii Supreme Court has observed the relationship between vested rights and fifth and fourteenth amendment guarantees both in this case and in other recent pronouncements on the vested rights issue, pronouncements upon which the appellants, County, its legal counsel and three state circuit court decisions had relied in this case. *County of Kauai* v. *Pacific Standard Life Insurance Co.*, 653 P.2d 766, 773, 779 (Haw. 1982); *Life of the Land, Inc.* v. *City Council*, 60 Haw. 446, 592 P.2d 26, 35 (1979) (*LOL I*); *Allen* v. *City and County of Honolulu*, 58 Haw. 432, 571 P.2d 328, 329 (1977). Public policy demands some semblance of reasonable predictability in the land development process, and the further along a development proceeds in gaining all necessary governmental approvals, the more concrete, literally, a proposal shapes into reality, the stronger becomes the con-

stitutional notion of fundamental fairness to be accorded the particular landholder.

As Professor Tribe states, "We deal here with the idea that government must respect 'vested rights' in property and contract—that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." L. Tribe, American Constitutional Law § 9-1 (1978). *See, e.g.*, Urban Land Institute, *supra* at 4 (vested rights merit constitutional protection); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960); *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1514-15 (1978).

Like the question of when does a regulatory taking occur, no judicial consensus exists as to precisely when a development expectation ripens into a vested property right. But no court has ever gone as incredibly far as the lower court—to hold that after years of public planning and zoning actions, of many governmental approvals of appellants' site plans and various building permits and of the spending of millions of dollars, all culminating in lawful construction of condominium housing and part of a hotel, appellants possessed no property rights warranting protection because 20 percent of the number of the County's eligible registered voters in the last preceding election petitioned for a rezoning referendum, a referendum that occurred after final permits were issued and construction had commenced and in spite of an unambiguous grandfather clause in the County Charter (§ 5.11) that reads "A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum." *County of Kauai, supra* at 772.

Generally, courts hold rights vest when, say, substantial expenditures have been made by the applicant or a preliminary subdivision plan been approved or building permits been issued or construction begun on the ground. *See, e.g.*, 4 N. Williams, American Planning Law—Land Use and the Police Power § 111.02 (1975); Urban Land Institute, *supra* at ch. 3. Virtually all courts regard the commencement of construction as being the latest possible event to trigger the vesting of rights. Recent Developments, *Developers' Vested Rights*, 23 Urb. L. Ann. 487, 497 (1982). Professor Hagman remarks that rights should certainly vest when there are expenditures constituting a "social loss," such as physical changes on the ground or the placement of infrastructure, both of which occurred here. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U.L. Rev. 545, 574-75 (1979). Indeed, this case's litany of state and local governmental approvals—administrative, legislative, executive and judicial (except for the state high court reversal)—of every phase of appellants' housing and hotel project, from the general plan amendments in 1976 and 1977 through the rezoning from "agricultural" to "resort" use down to site plan approvals and the 1980 permit issuances, with increasing financial commitments by appellants every step of the way culminating in actual construction, makes the lower court's finding of no constitutional problem in the court's singular vesting rationale an aberration of the most extreme sort.

For appellants, as would any responsible developer, not only relied on consistent governmental assurances and the plain language of the County's § 5.11 grandfather clause but also the Hawaii vested rights rule in effect up until the date of the Hawaii Supreme Court's surprising opinion. That rule fixed the time of constitutional vesting as when "official assurances" are given by the govern-

ment to a landowner that a project may proceed. *Life of the Land, Inc.* v. *City Council*, 61 Haw. 390, 606 P.2d 866, 902 (1980) (*LOL II*); *LOL I*, *supra* at 35-36; *Allen*, *supra* at 330; *Denning* v. *County of Maui*, 52 Haw. 653, 485 P.2d 1048, 1051 (1971); *see* Urban Land Institute, *supra* at 26-27; Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979). Appellants had "official assurances" in spades, so much so that the County joined the developers as this case made its way through the state courts. Even the state supreme court had to concede that the last discretionary permit action by the County was on April 9, 1980, a full seven months before the referendum election that revoked appellants' February 1979 rezoning. *County of Kauai*, *supra* at 775.

During the period preceding the referendum vote, appellants proceeded with development at a pace completely consistent with proper business practice, incurring approximately $4.3 million in costs and constructing and dedicating to the County several expensive public improvements as a condition to obtaining certain governmental approvals. By the time of the Hawaii Supreme Court decision in 1982, almost $50 million had been invested in the project. Jurisdictional Statement at 4-5, 11-12. No builder, given the overwhelming circumstances of this case as underscored by three trial court decisions and a county attorney's opinion that the law was as everyone thought it was, would invest substantial time and money on a housing project, particularly one that might be controversial, if he thought for one moment that it could all be taken away capriciously and retroactively with no regard given to his rights to due process and just compensation.

II. Zoning Referenda And The Constitution

The impact of the decision below goes far beyond the State of Hawaii. Referenda and initiatives have become quite prevalent recently, occurring in most of the states of the union. Note, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 Urb. L. Ann. 135, 136 n.8 (1981). Builders are continually subject to construction by plebiscite, especially if the proposed housing is of lower cost or higher density than those supporting a referendum or initiative would prefer to see.[1]

But while the referendum procedure approved in *City of Eastlake* v. *Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), was part of the regular development process in that city, in this case, it had all the predictability of a lightning bolt. It is this element of unpredictability that builders dread most because if the rules can change at any time, *with no protection given to those development rights that have already vested*, then little that is innovative or different or often socially desirable will ever come to fruition. That which is worth doing, always attendant

---

[1] For example, in a recent California case that is almost the mirror image of this case (except for no "taking of vested rights" issue), an apartment development aimed at moderate income families, though complying with the city's general plan and zoning ordinance and which was specifically approved by the city government, was later subject to an initiative petition to rezone the property. The petition, as in this case, was initiated by a neighborhood association for the sole purpose of defeating the already approved development. The voters adopted the initiative, and the city refused to issue building permits. In *Arnel Development Co.* v. *City of Costa Mesa*, 126 Cal. App. 3d 330, 178 Cal. Rptr. 723 (1981), the court held the initiative ordinance unconstitutional as an arbitrary and discriminatory rezoning in excess of the city's police power because the ordinance was not rationally related to the general welfare but only to serving the narrow interests of nearby property owners.

with some risk and usually at substantial up-front costs, will not get done because calculating the chance of success becomes a near impossibility even if one complies with all applicable planning, zoning and development controls.

In *Eastlake*, the only constitutional issue was that of due process because the zoning on the developer's land was the same from the day it was purchased through the referendum vote, which denied a rezoning—the land's use *never* changed. In *Kauai*, however, the developers' land was rezoned 21 months before the referendum election, which sought to undo retroactively the rezoning, and the subject property *physically changed* from agricultural use to 150 completed condominiums and a partially-built hotel. This Court said of *Eastlake*, "[t]he situation presented in this case is not one of a zoning action denigrating the use or depreciating the value of land; instead, it involves an effort to *change* a reasonable zoning restriction. No existing rights are being impaired. . . ." 426 U.S. at 679 n.13. In *Kauai*, however, we have an unmistakable issue of a taking of vested rights without just compensation in addition to an aggravated due process issue.

In *Eastlake*, every rezoning adopted by the city council had to be put before the voters for approval or rejection within 120 days of its passage. In *Kauai*, however, between certification of a referendum petition and the next general election, *two years* could pass. And because the Hawaii Supreme Court held that no governmental or private development action, up to and including construction, could serve to vest rights between certification and election, an unconscionable delay in a project's life would ordinarily result, a delay that could commence at any time since the state high court clearly implied that a referendum petition could be certified no matter how far along to completion a project was.

For while the referendum in *Eastlake* was mandatory, a part of the regular development process that everyone could take into account, the *Kauai* procedure is wholly discretionary, triggered when a mere 20 percent of the number of the County's voters in the last preceding election petitions for a referendum. Thus a small minority, late in a development's life, can interrupt an orderly process and effectively freeze an officially approved development for up to two years. The Hawaii Supreme Court's simple citation of *Eastlake* as support for its interpretation of the constitutionality of such a capricious procedure is a gross distortion of what the due process, and just compensation, clauses stand for and of what *Eastlake* means.

The Hawaii rule wreaks havoc on reasonable business practice, putting any builder in a "Catch-22" vise—despite all necessary approvals, he cannot rely ultimately on them but is left to speculate as to the outcome of a *possible* referendum that may or may not block completion of a *commenced* development. If a petition is certified, the builder is forced to gamble during the waiting period up to election day. Any further expenditures on his development will be completely wasted if he wrongly guesses that his zoning will not be taken away. Conversely, he will incur costly delays if work is suspended until the election results are final. It is an untenable position in which to be placed—to be denied both a fair and reasonably consistent building process and, at the same time, any rights to what one has legally earned while depending on that process. Under the Hawaii vested rights ruling, both developers and reviewing governments, by being so subject to the whim of a distinct minority, are asked to abandon the rational land use process upon which the general welfare *should* depend.

A reasonably predictable land use system insures fundamental fairness in the development scheme by simultaneously protecting individual rights and promoting the public's welfare. Comprehensive government planning is the backbone of any competent, responsible system, lending coherence and discipline to efficient, orderly land regulation. *See, e.g.*, D. Mandelker, The Zoning Dilemma 57-70 (1971); Haar, *In Accordance with a Comprehensive Plan*, 68 Harv. L. Rev. 1154 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 Mich. L. Rev. 899 (1976); Sullivan & Kressel, *Twenty Years After—Renewed Significance of the Comprehensive Plan Requirement*, 9 Urb. L. Ann. 33 (1975). A major report by the American Bar Association's Advisory Commission on Housing and Urban Growth recommends that the newly complex nature of American land regulation demands special fairness and rationality and advocates comprehensive planning "to insure internal *consistency*, to provide *predictability*, and to *reduce* the tendency toward *arbitrary* local decisionmaking." Housing for All Under Law—New Directions in Housing, Land Use, and Planning Law 323, 408 (R. Fishman ed. 1978) (emphasis added). The very existence of a plan gives assurances that the administration of land use regulation will not serve sheer "private or parochial community interests." R. Nelson, Zoning and Property Rights—An Analysis of the American System of Land-Use Regulation 79 (1977). Writes Richard Babcock, "[t]o the citizen or landowner, the content of the plan is no more important than is the function of the plan to assure openness, predictability, and impartiality in the public decisions that implement the plan." The Zoning Game 134 (1966).

The supreme irony of the Hawaii decision is that it stands on its head what Professor Mandelker proudly

calls the most rigorous land development system in the world, one in which Hawaii ties planning to zoning more closely than any state in the union. Mandelker & Kolis, *Whither Hawaii: Land Use Management in an Island State*, 1 U. Haw. L. Rev. 48, 48 (1979); Callies, *Land Use Controls: Of Enterprise Zones, Takings, Plans and Growth Controls*, 14 Urb. Law. 781, 801 (1982). Indeed, the high importance of comprehensive planning, of dependable land use management and regulatory controls, are the keys to understanding the Hawaii system's careful focus on good planning and fair process. *See, e.g.*, D. Mandelker, Environmental and Land Controls Legislation 269-322 (1976); Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. Haw. L. Rev. 167 (1979); Lowry, *Evaluating State Land Use Control: Perspectives and Hawaii Case Study*, 18 Urb. L. Ann. 85 (1980).

Notwithstanding the manifest integrity of the state system, one that is repeated to varying degree throughout the nation and one that has been, until the opinion below, kept in reasonably good stead by the strictures of the Constitution's due process and just compensation clauses, the lower court has chosen to ignore that system. It has chosen to ignore the explicit words and obvious public policy of the County Charter's § 5.11 grandfather clause regarding vested rights and zoning referenda. It has chosen, finally, to ignore the fifth and fourteenth amendments. The lower court, by stripping appellants of their vested rights and misapplying *Eastlake* to the egregious circumstances at hand, has created an anomaly—government officials cannot rely on their public planning and regulatory scheme to guide future growth, and developers can never be assured that they will be able to complete a project once started.

III. Due Process And Just Compensation Redux

At bottom, this case is like two trains traveling along two parallel tracks—the development track and the referendum track—in which the switch that keeps them apart once property rights have vested, the County Charter's pellucid grandfather clause, was inexplicably pulled by the Hawaii Supreme Court, causing a collision of constitutional magnitude. The self-admitted harshness of the court's action, *County of Kauai*, *supra* at 780, is particularly bewildering because legislative devices such as grandfather clauses have been specifically recommended as a fair and orderly way of protecting vested rights from unconstitutional incursions. Urban Land Institute, *supra* at 4. If due process in zoning means anything, it means providing "fundamental fairness" to the aggrieved individual. *City of Eastlake*, *supra* at 694-95, 680 (Stevens & Brennan, JJ., dissenting, and Powell, J., dissenting).

Equal to that fairness concept is the constitutional principle that "justice and fairness" requires just compensation for harsh economic injury sustained by public action. *San Diego Gas & Electric Co.*, *supra* at 656, 660 (Brennan, J., dissenting opinion); *Agins*, *supra* at 263; *Kaiser Aetna*, *supra* at 175; *Penn Central*, *supra* at 124. How much harshness is required before compensation is called for, how far is "too far" before a regulatory action will be recognized as a taking, "necessarily requires a weighing of private and public interests." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *Agins*, *supra* at 261.

In *Kaiser Aetna*, a Hawaiian regulatory taking case similar to the case at bar, this Court found a remedy in the just compensation clause for the conversion of a private resort pond into a public aquatic park after the developers "had invested millions of dollars" on their marina sub-

division. *Kaiser Aetna, supra* at 169, 176. The substantial "interference with reasonable investment backed expectations" that occurred in *Kaiser Aetna* (at 175), a key factor for determining when a taking transpires, was certainly no different in degree than the virtual wipeout of appellants' multi-million dollar investment in an ongoing housing and hotel project rezoned retroactively to "agricultural" use. *See generally* D. Hagman & D. Misczynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1978).

A developer decides to build a project based on justifiable expectations of costs from land acquisition and financing through construction and sale or rental. Increased costs of unnecessary delay once a project is underway, coupled with the uncertainty of completion despite compliance with all development laws, creates an enormous disincentive, leading eventually to further abandonment of those projects needed to house a growing and diverse population. In this instance, the developers were building condominiums and a hotel. In other situations, such as *Arnel*, the housing under attack is on small lots or are apartments or townhouses or is marketed toward lower income citizens. In the volatile, mischievous scheme created by the lower court's ruling, in which the fifth and fourteenth amendments must give way to the whim of a few, what prudent builder, with something valuable but different to offer, would even risk entering such a market?

What worth have rights that one may have them deprived and taken for no better reason than that which is politically popular?

CONCLUSION

For the above reasons, this Court should note probable jurisdiction.

Respectfully submitted,

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359
Counsel for Amici

ANN REINES KAHN
NANCY H. LIEBERMANN
National Housing Center
Washington, D.C.

EDWARD J. SACK
International Council of Shopping Centers
665 Fifth Avenue
New York, N.Y. 10022
Of Counsel

April 1983

No. 82-1477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

vs.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

On Appeal from the Supreme Court of Hawaii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

WILLIAM D. NORTH
430 N. Michigan Avenue
Chicago, Illinois 60611
(312) 329-8366

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

Of Counsel:

LAURENE K. JANIK
430 N. Michigan Avenue
Chicago, Illinois 60611

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

VS.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

On Appeal from the Supreme Court of Hawaii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter sometimes "National Association") respectfully moves the Court for leave to file its brief *amicus curiae* in support of Appellants' Jurisdictional Statement. The grounds for this motion are as follows:

1. The NATIONAL ASSOCIATION OF REALTORS® is a non-profit professional association comprised of over 600,000 persons engaged in all phases of the real estate business. The NATIONAL ASSOCIATION

OF REALTORS® is the chief spokesman for the real estate industry and for the millions of American property owners its members represent. An estimated 80% of all real estate licensees in the United States are members of the National Association. These professionals are responsible for over 80% of the resale real estate transactions, totalling approximately $25.5 billion in 1982. As these numbers indicate, the National Association represents a major segment of this nation's economy.

2. One of the primary purposes of the National Association is the protection and promotion of private ownership of real property.

3. The ruling of the Hawaii Supreme Court is of vital concern to the National Association because of the direct threat it poses to private property rights and its anticipated widespread impact on future real estate development.

4. The National Association sought consent of Appellants and Appellees and received the consent of the Appellants and of Appellees, County of Kauai and the Mayor of the County of Kauai. These consents are filed herewith.

The NATIONAL ASSOCIATION OF REALTORS® requests that it be permitted to file the annexed brief *amicus curiae*.

WILLIAM D. NORTH
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8366

Counsel for the
NATIONAL ASSOCIATION OF REALTORS®

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

In The

Supreme Court of the United States

October Term, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

vs.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

On Appeal from the Supreme Court of Hawaii

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a non-profit professional association comprised of over 600,000 persons engaged in all phases of the real estate business.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR is the owner of various registered service and collective membership marks, including the mark "REALTOR®." Over the years NAR has promoted a public understanding of the term "REALTOR®" as identifying a member of NAR engaged in the real estate business and subscribing to and bound by a strict Code of Ethics.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of every significant problem encountered by property owners for three quarters of this century. Through its long and undeviating commitment to the protection of the property owner and his rights and interests in his property, NAR has earned the right to speak not only for the real estate industry but for the American property owner.

Of the problems which have concerned NAR, none has been more fundamental or of greater importance than the preservation of private property rights founded in the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real property.

INTEREST OF AMICUS

The impact of the issue presented in this case should not be perceived as limited solely to the application of a rezoning referendum to a developer on the island of Kauai. The consequences of the Hawaii Supreme Court's decision reach far beyond the shores of Kauai, and beyond the boundaries of any one state, involving the measure of protection afforded all property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the "taking" of primary rights and benefits of land ownership without compensation.

The historical and substantial commitment of NAR to the preservation of private property rights mandates its attention to the threat this case represents to property owners and property ownership in this country.

NAR is uniquely positioned to perceive the seriousness of this threat. Not only does its membership span the entire nation, these members are involved in upwards of 80% of resale property transactions. This comprehensive involvement at the grassroots level of land

development, investment and sale provides NAR with a direct and unobstructed view of the impact regulatory actions such as the one at issue will have on the exercise of constitutionally protected property rights.

NAR does not propose herein to duplicate the legal arguments so ably presented in Appellants' Jurisdictional Statement. Rather, NAR endorses and urges to this Court these arguments. Further, to avoid unnecessary repetition, NAR adopts the Statement of Facts set forth at length in Appellants' Jurisdictional Statement. The purpose of NAR in submitting this brief *amicus curiae* is to voice the concern of hundreds of thousands of NAR members and the millions of American property owners they serve with the threat which the decision of the Court below constitutes to the rights of private property guaranteed by the Constitution.

ARGUMENT

I.

THE DECISION BELOW VIOLATES THE "TAKINGS CLAUSE" OF THE FIFTH AMENDMENT, AS INCORPORATED IN THE FOURTEENTH AMENDMENT, BY FRUSTRATING DEVELOPERS' REASONABLE INVESTMENT-BACKED EXPECTATIONS.

A. The "Takings Clause" Requires Just Compensation For Government Regulation That Denies Reasonable Investment-Backed Expectations.

This Court has consistently held that governmental conduct which frustrates or denies reasonable investment-backed expectations constitutes a "taking" which requires the payment of just compensation. In 1922 Justice Holmes authored the seminal statement that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Since that time, this constitutional principle has been repeatedly reaffirmed by this Court. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). It is true that the determination of what constitutes a "taking" is a "question of degree and cannot be disposed of by general propositions," *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 416, and requires that factual inquiries be made in each instance. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). But this Court has never permitted such determination to be made "willy-nilly" without legal rationale or standards. To the contrary,

this Court has insisted that the constitutional analysis of alleged "takings" involve a consideration of three factors: first, the economic impact of the regulation; second, its interference with reasonable investment-backed expectations; and third, the character of the governmental regulation. *PruneYard Shopping Center v. Robins, supra,* 447 U.S. at 83; *Kaiser Aetna v. United States, supra,* 444 U.S. at 175; *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 124.

Although each of these factors must be evaluated in the balancing of governmental versus private interests required to resolve "taking" issues, the nature and extent of interference with "investment-backed expectations" has been found to be of "particular significance." *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 102 S. Ct. at 3171. The particular significance of this factor is the direct result of this Court's assurance in its *Pennsylvania Coal* decision that the reasonable investment-backed expectations of property owners would not be frustrated or denied by governmental restrictions or prohibitions without the payment of just compensation.

In stark contrast to this Court's historic protection of reasonable investment-backed expectations, the Hawaii Supreme Court would repudiate and ignore such expectations entirely in determining whether a retroactive change in zoning laws to terminate preexisting development rights requires the payment of just compensation.

The issue presented by this case is thus not a mere semantic squabble or formula foofaraw, but fundamental constitutional conflict presenting a substantial federal question.

This Court's decision in *Pennsylvania Coal Co. v. Mahon, supra,* firmly established the proposition that

even a state statute that substantially furthers important public policies may so frustrate reasonable investment-backed expectations as to constitute a "taking" under the Constitution. *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 127. In the present case, the referendum not only frustrates the investment-backed expectations of the Developers, it literally annihilates them.

In *Pennsylvania Coal, supra*, a coal company sold land and a house but expressly reserved the right to remove the coal located thereunder regardless of any risk to the house. The homeowner brought an action seeking to enjoin the mining of coal under his property in such a way as to cause a subsidence of the surface and of his house. A Pennsylvania statute *enacted after the transaction* prohibited the mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from improved property owned by another. This Court refused to give effect to the statute which would have made it commercially impracticable for the company to mine the coal on the ground that its application would have had nearly the same effect as a complete destruction of the coal company's rights, 260 U.S. at 414. This Court held that the statute effected an unconstitutional "taking" and reversed the decision of the Pennsylvania Supreme Court that had enjoined the mining of coal.

Never repudiated, always affirmed by the Court, the rationale and decisional standards established in *Pennsylvania Coal* to identify a "taking" requiring just compensation are squarely applicable in the present case and should be controlling if the Developers' expectations were "investment-backed" and "reasonable."

B. The Developers' Expectations In This Case Were Both Investment-Backed And Reasonable.

On the record, there simply can be no question that the Developers' expectations here were "investment backed." Aside from the purchase of the development site and the substantial managerial, architectural, legal, and other overhead expenditures which went into the planning of the project, the Developers actually completed 150 condominiums and one-third of a resort hotel before the decision of the Hawaii Supreme Court was rendered. These investments also included the development of special public improvements required by County officials, including public beach development, road improvements, and the construction of water purification facilities to be made to the community in general, as well as the development.

The undisputed and indisputable reality of the Developers' investment in support of their expectation leaves the "reasonableness" of such expectation as the decisive issue in determining whether this Court's rule in *Pennsylvania Coal* should control here.

The "reasonableness" of the Developers' expectation that they could proceed safely with their development notwithstanding the certification of the referendum may be evaluated from two standpoints.

From one standpoint, reasonableness may be judged in terms of the actions and events which encouraged or induced the Developers' expectations. The record is replete with such actions and events including, but by no means limited to, first, the unambiguous language of Section 5.11 of the County Charter; second, the written opinion of the County Attorney advising that the certification of the referendum did not suspend the current zoning of the Developers' property and recommending that the Planning Commission of the County of Kauai

continue to process the Developers' permits; and third, two decisions by the Circuit Court of Hawaii, one ruling that the filing of the referendum petition did not suspend the effect or operation of the zoning ordinance, *In the Matter of the Application of Pacific Standard Life Insurance Company*, Civil No. 2260 (Haw. Cir. Ct. Sept. 5, 1980), and the other, refusing to grant a temporary restraining order and preliminary injunction to halt the construction of the condominiums, *Committee to Save Nukolii v. Nishimoto*, Civil No. 2321 (Haw. Cir. Ct. Sept. 5, 1980).

The Developers were reasonably entitled to proceed with their project in reliance upon the clear meaning of Section 5.11 of the Kauai County Charter which provided that "A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum" for three reasons: first, the language of Section 5.11 was, as the Court below itself acknowledged, entirely unambiguous (Appendix to Appellants' Jurisdictional Statement ("App.") at A-10); second, there existed no case, precedent, dictum or other legislative or judicial indication that Section 5.11 would be interpreted other than literally; and third, as further evidence of the understanding that Section 5.11 was to be read literally, even opponents of Developers' project believed it necessary to amend Section 5.11 to give retroactive effect to the referendum since they included such a Charter amendment on the same ballot as the referendum.

The opinion of the Kauai County attorney was yet another action which evidenced the reasonableness of the Developers' reliance on a literal reading of Section 5.11. That opinion concluded that the certification of the referendum did not suspend the zoning ordinance and advised that the Planning Commission could and should

legally continue to process the Developers' permits (App. at A-66-67).

To the language of the statute, the referendum proponents' action to amend Section 5.11, and the opinion of the County Attorney may be added two Hawaii Circuit Court decisions, each of which read Section 5.11 literally. Thus, in an action brought by the Committee to Save Nukolii, summary judgment was granted in favor of the Developers, with the Court ruling that the Kauai County Charter "contains no provision that suspends the effect or operation of an ordinance when a referendum petition is filed and certified. . . ." *In the Matter of the Application of Pacific Standard Life Insurance Co., supra.*

Just two months after its first ruling, the Hawaii Circuit Court once again provided its assurance to the Developers that they were proceeding in accordance with the law by refusing to grant a Motion for Temporary Restraining Order and Preliminary Injunction sought by the Committee to Save Nukolii to halt construction of the condominiums. *Committee to Save Nukolii v. Nishimoto, supra.*

Viewed in terms of the events and actions on which the Developers could base their decision to proceed with their development and invest in their expectation of accomplishment, there is not one which suggested, hinted or implied that they did so at their risk and peril and without reason.

The other standpoint from which the reasonableness of the Developers' investment-backed expectations can be viewed is simply in terms of what actions the Developers could have taken, but didn't, which would have identified their expectations as "unreasonable." Viewed in these terms, it is clear the Developers did everything

they could. The refusal of the Committee to Save Nukolii to appeal the State Circuit Court's affirmance of the decision of the Planning Commission, *In the Matter of Application of Pacific Standard Life Insurance Co., supra*, and the denial of the Committee's request for a temporary restraining order and preliminary injunction, *Committee to Save Nukolii v. Nishimoto, supra*, frustrated the only opportunities which the Developers had to obtain "early warning" of the Hawaii Supreme Court's interpretation of Section 5.11.

From any perspective, the Developers' expectations that their property rights and investments in them would be protected from retroactive application of the referendum were reasonable. And if they were reasonable and can nevertheless be frustrated, then the constitutional guarantees of private property are protected by nothing more than the whim and caprice of popular plebiscite.

II.

THE HAWAII SUPREME COURT'S DECISION APPLIES STATE PROPERTY LAW TO EXTINGUISH FEDERAL CONSTITUTIONAL RIGHTS.

The decision below reaches its result by treating in isolation two issues which are inextricably intertwined and interdependent. Thus, the first issue, whether the referendum had retroactive impact, was stated by the Court to involve a balancing of the interests of private landowners to develop their resort-zoned property and the interest of the electorate to prevent development by referendum (App. at A-7). The Court ruled in favor of retroactive application of the referendum process and against the Developers' rights (App. at A-22). This result was accomplished by rejecting the literal meaning of the

County Charter provisions which placed specific limitations on the exercise of the referendum power and analyzing the case under a theory of equitable estoppel (App. at A-10). Employing that theory, the Court was able to conclude that the Developers had no right to proceed with their development other than at their own risk (App. at A-16).

The second issue addressed by the Court was whether the application of the zoning referendum to the Developers' project was consistent with constitutional concepts (App. at A-22). The Court summarily disposed of this issue, finding that its prior estoppel analysis resolved the constitutional considerations against the Developers (App. at A-24). By concluding that the Developers were estopped from acquiring rights to construct the resort after the referendum was certified, the Court determined the Developers had nothing "taken" from them (App. at A-25).

This is "bootstrap" reasoning. It presents the Developers here, and every other owner and developer of real estate bound by the precedent established, with an intolerable "Catch 22" which makes the constitutional concept of "taking" wholly illusory. If, as the Court below has held, vested property rights may be "taken" without compensation by merely making the regulation or referendum accomplishing the taking effective on a date before they were vested, then property rights have no more substance than a ministerial act.

Only by rejecting the admittedly unambiguous language of the County Charter was the Hawaii Supreme Court able to establish the date of *certification* of the referendum rather than the date of the referendum itself as the pivotal date from which to judge the Developers' actions. And only after it had moved the operative date back from November 4, 1980, the date of the

referendum, to January 30, 1980, the date of certification, did it begin its analysis of the constitutional impact of the referendum's application to the Developers. Thus, the entire analysis of whether the referendum was reasonably related to the county needs (App. at A-23) and whether it constituted an uncompensated taking (App. at A-24-25) was performed under a factual premise *created* by the Court, which premise did not exist at the time the Developers' good faith expenditures were made.

By stripping the Developers of all protection afforded to them by Section 5.11 of the County Charter, the Hawaii Supreme Court was able to conclude that the Developers "had only a reasonable belief that the Nukolii site could be developed in accordance with the resort zoning" and that the Developers' "expenditures and site preparation work constituted business risks rather than a basis for constitutional claims" (App. at A-24).

This is not logic; this is not law; this is not due process as the Constitution defines it. It is, at most, the product of judicial illusionists who make substantial, vested property rights vanish into thin air, leaving nothing but an "empty fee."

CONCLUSION

No concept is more deeply rooted in American jurisprudence than the right to own and use property free from deprivation by unreasonable governmental regulation. The property owner's only shield against unreasonable and confiscatory government regulation is the constitutional guarantees of the Fifth and Fourteenth Amendments against "taking."

Should this Court fail to note probable jurisdiction of the appeal and the issues presented herein, the Fifth Amendment's protection against the "taking" of private property, made applicable to the states through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, B. & O. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897), will prove merely an illusion for these Developers who have invested significant sums in reliance upon existing zoning and unambiguous language of the County Charter.

But onerous and unjust as is the impact of the decision below on the Developers, the primary concern of the NAR is with its impact on the progress and costs of future land development.

The "taking" of the Nukolii site will serve as a warning to all would-be owners, developers and builders that their property rights are no longer secure under the constitutional guarantees of the Fifth and Fourteenth Amendments. The exercise of heretofore constitutionally-protected private property rights will be "chilled," impacting negatively on all forms of development, including housing, apartments, shopping centers, factories, and recreational and cultural facilities.

Unless the federal questions raised in this appeal are recognized as substantial and resolved by this Court, a property owner will never know whether he owns a property interest that is capable of development.

Developers, too, are now on notice that they may no longer plan their conduct with any reasonable certainty of the legal consequences. Any land development must proceed "at risk" notwithstanding the existence of unambiguous land use ordinances, or letters of opinion authored by municipal attorneys or judgments entered by the courts, or all three.

Although land development has always entailed an element of risk, such as risks posed by current market conditions, economic trends and growth patterns, never before have developers had to face the uncontrollable risk that the plain language of zoning regulations—the very foundations of a rational land development process —could be reinterpreted retroactively to confiscate without compensation a project that had been undertaken in compliance with and in reliance upon that plain language.

Those few developers daring enough to gamble on the zoning laws subject to such reinterpretation will find even fewer sources of financing willing to take such a risk. Investors will not readily put money into a project that could be entirely destroyed by a change in the zoning laws retroactively applied. And those investors who will accept such a risk will translate that risk into added cost to the developer and, hence, the ultimate consumer.

For the foregoing reasons, NAR urges the Court to recognize the substantial nature of the federal questions presented and to note probable jurisdiction, or, in the alternative, grant certiorari.

Respectfully submitted,

WILLIAM D. NORTH
430 N. Michigan Avenue
Chicago, Illinois 60611
(312) 329-8366

Counsel for Amicus Curiae
NATIONAL ASSOCIATION OF REALTORS®

Of Counsel:
LAURENE K. JANIK
430 N. Michigan Avenue
Chicago, Illinois 60611

Dated: April 4, 1983

No. 82-1477

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

Pacific Standard Life Insurance Company
and Graham Beach Partners,

Appellants,

v.

Committee to Save Nukolii, County of Kauai
and Eduardo E. Malapit, in his capacity as
Mayor of the County of Kauai,

Appellees.

On Appeal from the Supreme Court of Hawaii

RESPONSE TO PROPOSED AMICUS BRIEFS

ROBERT L. GNAIZDA
SIDNEY M. WOLINSKY
ANITA P. ARRIOLA
Public Advocates, Inc.
1535 Mission Street
San Francisco, CA 94103
(415) 431-7430

ROBERT HARRIS
Harris & Smith

LINDA B. LEVY

Counsel for Appellee
Committee to Save Nukolii

April 8, 1983

RESPONSE TO PROPOSED AMICUS BRIEFS

The Committee to Save Nukolii (hereinafter "the Committee"), Appellees in this action, oppose each of the aforementioned motions for leave to file an amicus curiae brief, and submit that both motions should be denied. Because the same defects appear in each proposed brief, this response will deal with them jointly.[1]

Premature:

The proposed amicus briefs are of no utility to the Court because they are premature. They discuss no issues relevant to the threshold question of whether or not this Court should even consider the case. Neither of the proposed amici even addresses the fact that the decision below is not a

---

[1] The motion of National Association of Realtors (hereinafter "Realtors") fails to state that Appellee Committee refused consent to filing of their brief. Rule 36(1) of the Supreme Court Rules provides that a "motion for leave to file such a brief when consent has been refused is not favored." Appellees oppose the filing of any amicus briefs at this stage of the litigation.

final judgment (because it requires further extensive proceedings) or the admitted fact that no purported federal question was ever raised in any court below until after a decision of the highest state court. The proposed briefs do not discuss the fact that the decision below rests on dispositive state grounds nor do they deal with numerous factual determinations made directly counter to appellant's assertions.

Hypothetical:

Second, the statement of the issues (and the arguments which follow) contained in each of the proposed briefs have nothing to do with this case. The brief deals with hypothetical questions and policy arguments which are in no way presented by the case below. For example, the "Question Presented" in the proposed amicus of National Association of Homebuilders, etc. starts by assuming "vested" rights. Yet the court below found that under the facts of the case, Appellant/Petitioners had failed to prove any of the four elements

required to establish a vested right under longstanding Hawaii law. Similarly, the proposed brief of Realtors rests on "reasonable investment-backed expectations", but the Hawaii courts found as facts that there were no such expectations in this case, that any expenditures were "speculative" (App. at A-21), that the Developers' own contracts showed that they knowingly undertook "business risks" (App. at A-24), and that the Developer not only did not rely, but proceeded in bad faith (App. at 15-16, -20, -24).

Hawaii Landownership Unique -- 72 Landowners:

Third, both proposed amici are irrelevant because they utterly fail to deal with the unique nature of Hawaii property ownership. It is estimated that over 95% of privately owned Hawaiian land belongs to only 72 landowners. See Midkiff v. Tom, No. 80-4368, Mar. 28, 1983 (9th Cir.) p. 18. By contrast, 64% of all Americans own their own homes and many who are not homeowners own land. Out of this unique Hawaii land structure has

developed a complex framework which must necessarily take into account a society in which the overwhelming majority of citizens do not and cannot own land. As opposed to the rest of the nation, Hawaiians have effective access to just one major "property" right: the right to vote. Accordingly, the Hawaii Supreme Court decision must be viewed in light of this and other very special local circumstances (such as the fact that the land in question was acquired by Appellants as agricultural). The proposed amici, which fail to take this into account, present hypothetical discussions which have no relation to the procedural or substantive realities of this case.

Misleading "Facts"

Finally, both amici are affirmatively misleading as to the facts. They try to make this case sound as if a Developer had virtually completed a project, only to find that the zoning had been changed. On the contrary, this case, as the record amply

shows, is one where virtually all construction took place and most expenditures were made after the referendum passed and the case had been appealed to the Hawaii Supreme Court. Referenda aside, building after a case has been submitted to a state Supreme Court and while awaiting a decision from that Court is a gamble, and can hardly be described as an "expectation" without doing considerable violence to both language and policy. As the Court recognized, this was a calculated and bad faith attempt to create a fait accompli and not an investment-backed "expectation" by any definition.

The argument which the moving parties seek to make is a straw man. It hypothesizes an ideal issue which this Court might someday wish to decide, constructs abstract statements about what the Hawaii Supreme Court might have held if different facts had been presented to it, and then proceeds to argue on that basis.

The extent to which the discussions in

the proposed amicus briefs deviate from anything remotely presented in the instant case is also illustrated by their assumption of a national land use system. Such a system has never existed and would be unworkable in the extreme, particularly in Hawaii due to its oligarchical land ownership. Moreover, it would represent the most extraordinary sort of intrusion into the historical province of the states.

Amici briefs to the United States Supreme Court should be genuinely helpful. They should not mislead the Court into thinking the case is a different one than the case which in fact was decided below. The proposed amici do not meet this minimum criterion.

In any event, leave to file amicus briefs before the highest Court in the country are not and ought not to be lightly granted, as the Court Rules recognize, especially before the Court has given any indication that it has any interest in

hearing the case. Counsel for Appellees have also been contacted by groups with an interest in filing amicus briefs supporting the position that the decision of the Hawaii Supreme Court is one of extremely limited circumstances, and rests upon the very unusual facts of a developer not in good faith obtaining permits on the day before the referendum and upon which permit they did not genuinely rely. Appellees have suggested that such groups not file any such briefs because they would be premature at this stage of the litigation and would unduly add to the Court's already considerable workload. Appellees believe that the same reasoning applies to the amicus briefs solicited by Appellant.

DATED: April 8, 1983

Respectfully submitted,

ROBERT L. GNAIZDA
SIDNEY M. WOLINAKY
ANITA ARRIOLA
Public Advocates, Inc.

ROBERT HARRIS
LINDA B. LEVY

Counsel for Appellee
Committee to Save Nukolii

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this RESPONSE TO PROPOSED AMICUS BRIEFS upon Appellant and Appellees pursuant to Supreme Court Rule 28 by placing three copies in the U.S. Mail with first class postage prepaid, addressed to:

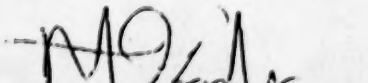
Leon Silverman
Sheldon Raab
Fried, Frank, Harris,
Shriver & Jacobson
1 New York Plaza
New York, NY 10004

Counsel for Appellants
Graham Beach Partners,
Pacific Standard Life
Ins. Co.

Morris S. Shinsato
Michael K. Abe
County of Kauai
4396 Rice Street
Lihue, Kauai, Hawaii
96766

Counsel for Appellees
County of Kauai,
Mayor Eduardo Malapit

Done this 10th day of April, 1983 at San Francisco, California.



Robert L. Gnaizda